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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IMPERIAL IRRIGATION DISTRICT.

Plaintiff

Vs.

UNITED STATES OF AMERICA, GALE NORTON, BENNETT RALEY, and ROBERT W. JOHNSON

Defendants

Case No. 03 CV0069 W (JFS)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE

FRCivP 24

WALTER HOLTZ, MICHAEL MORGAN, and MICHAEL STRAHM,

Applicants in Intervention

Vs.

UNITED STATES OF AMERICA, GALE NORTON, BENNETT RALEY, ROBERT W. JOHNSON, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, and IMPERIAL IRRIGATION DISTRICT,

Cross-defendants

Hon. Thomas J. Whelan
Courtroom 7

Opposition, if any, due within five Court days.

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INTRODUCTION AND SUMMARY

Intervenors are guaranteed to lose. As the lawsuit is presently structured, no matter its outcome, WALTER HOLTZ, MICHAEL MORGAN, and MICHAEL STRAHM and all others like them who own land in the service area of IID will lose. They may lose only a few rights or they may lose substantial rights, but they will bear a loss unless they are allowed to join. WALTER HOLTZ, MICHAEL MORGAN, and MICHAEL STRAHM (INTERVENORS) request leave to intervene in this action as plaintiffs. INTERVENORS' interests are directly and adversely affected by this action, and cannot be adequately represented by the existing parties. For purposes of this motion, INTERVENORS will not repeat the background and explanatory information that has been set forth in substantial detail by the other parties to the litigation and are adopting the common abbreviations as necessary unless otherwise noted.

The complaint of Imperial Irrigation District ("IID") that was filed on January 10, 2003 seeks to overturn the December 27, 2002 decision of the Secretary of the Interior ("Secretary") made pursuant to the regulations in 43 C.F.R. Part 417, allocating for consumptive use 2,769,600 acre-feet ("AF") of Colorado River water to IID for Calendar Year 2003. The complaint alleges that this Secretarial decision is unlawful for a variety of reasons. INTERVENORS wholeheartedly support IID's positions vis a vis the Law of the River, as their proposed cross-complaint reflects. IID's position is opposed by not only the federal defendants, but also the Metropolitan Water District of Southern California (MWD) and Coachella Valley Water District (CVWD).

The issues raised in IID's complaint and the answers thereto directly and adversely threatens INTERVENORS' interests in several ways. First, the Colorado River water allocated to California (the 4.4 MAF) is a zero sum game among the California entities, which all existing parties admit. INTERVENORS and others like them are the real parties in interest involved in that game. In other words, if the Secretary (and MWD and CVWD) are correct, the parcels of land owned by INTERVENORS will be impressed with a limitation on the right to use water that did not exist before. Whether such a new limitation is justified under

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appropriate law is the focus of the IID action, and is why INTERVENORS and those like them are the ones most directly, immediately, permanently, and legally affected by this action. They have the right to intervene and have a voice in the resolution of this (morass of) controversy.

The effect of the Secretary's water order is particularly direct for INTERVENORS and others like them. Unlike many other California water entities, the water right an irrigation district holds in trust is attached -- acre-by-acre – to the land itself. Water Code § 22250. A change in that right is a de facto easement on every acre of land. That easement will depreciate the value of the land, in that any diminution of the amount or reliability of a long-term water source factors notably into value. As often quoted about the Imperial Valley, "In the whole region, land as mere land is of no value. What is really valuable is the water privilege." John Wesley Powell.

Second, much of IID's complaint is premised upon an interpretation of certain agreements to which INTERVENORS and others like them (i.e., the beneficiaries of IID's water rights trust) are intended beneficiaries. IID's complaint and the answers on file seek a judicial declaration as to the meaning and construction of these agreements, which include the Seven Party Agreement, the 1988 MWD-IID Conservation Agreement, and the 1989 Approval Agreement. Because INTERVENORS and those like them are intended beneficiaries of these agreements and have rights under them, their interests are directly impacted by IID's lawsuit, which seeks to construe these agreements.

Finally, one of MWD and CVWD's defenses to the lawsuit seeks to lend the force of this Court to a conclusion that the lands (such as those of INTERVENORS) in the IID service are not complying with the reasonable and beneficial use requirement. Thus, the defenses to the lawsuit not only seek to interpret various contracts, they also ask this Court to find that lands in the IID service area are using water unreasonably. It is fundamentally unfair for one party to seek a judicial ruling on an issue against another party without that other party's participation in the litigation.

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INTERVENORS' interest in seeing that the Secretary is not being arbitrary in her application or interpretation of the law of reasonable and beneficial use is not like the "interest" that any citizen has in seeing that the government enforces the law. INTERVENORS are members of the specific class that is specially protected by the reasonable and beneficial use doctrine. Section 13(d) of the BCPA, 43 U.S.C. section 6171(d), expressly makes water users like INTERVENORS intended beneficiaries of the reasonable and beneficial use requirements in the Colorado River Compact, and authorizes INTERVENORS to assert that requirement in any litigation respecting Colorado River water. The BCPA expressly recognizes that the conditions and covenants of the Colorado River Compact, including the reasonable beneficial use requirements, "shall be deemed to be for the benefit of and be available to . . . the users of water therein or thereunder, by way of suit, defense or otherwise, in any litigation respecting the waters of the Colorado River." Section 13(d) of the BCPA, 43 U.S.C. section 617l(d). (Emphasis added). Thus, INTERVENORS have statutory authorization under the BCPA to enforce the proper interpretation of the reasonable and beneficial use requirement which distinguishes INTERVENORS' interests from that of the average citizen.

The interests of INTERVENORS that are threatened by this lawsuit are legally protectable interests. They are based on statutes, contracts, and the December 27, 2002 final decision of the Secretary on IID's water order. They are not mere economic expectations. They directly affect the ability of INTERVENORS to use their land because if the Secretary (or MWD or CVWD) prevails, INTERVENORS' lands will be subject to new restrictions on how much water can be used, as one is limited to a ratable amount of the total as a matter of California law. Water Code § 22250.

INTERVENORS' rights and interests cannot be adequately protected by the other parties. They are not mere members of an interested class, but are – by IID's own admission when it filed a petition for a writ of certiorari in the Yellen (160 acre limitation) case – the actual beneficiaries, and as a matter of pleading practice the real parties in interest. FRCivP 17.

The court's conclusion that application of acreage limitations to individual landowners (as distinguished from the District) would not impair present perfected

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> rights is premised on a misunderstanding of the nature of water rights "owned" by irrigation districts in California. Although it is true that the District holds the legal title to the water rights, it holds this title in trust for the landowners, who own the beneficial interest. It is the individual landowner – not the District – who puts the water to beneficial use. Under California law, each individual landowner has a statutory right to a definite proportion of the District's water. And each individual landowner has a statutory right to assign his proportionate share. Moreover, the right to such proportionate share becomes appurtenant to the land upon which the water is used.

Decl. Of PJM ¶ 3 (Exhibit 2, pp. 10-11), (quoting IID's Petition for Writ of Certiorari, September 14, 1979, pp. 15-17). As demonstrated below and in the proposed pleading, INTERVENORS are not adequately represented by IID for several reasons. First, INTERVENORS and others have revoked IID's trust responsibility. See ¶ 37 of the proposed pleading. Second, INTERVENORS have a variety of trust controversies with IID. Third, IID has adopted litigation tactics that are troubling to INTERVENORS for their practical effect outside of the courtroom. In addition, IID's authority and source of power under California law is by no means oriented towards INTERVENORS and others like them.

INTERVENORS are owners of land to which the underlying water right is appurtenant as a matter of both California and federal law. 43 USC § 617l(d) and California Water Code § 22250. What they farm, and whether they use water well or poorly make not a whit of difference for purpose of this motion. INTERVENORS need not show more at this stage (but are ready to voluntarily disclose personalized information once allowed intervention) than their status as a beneficiary of the water rights IID holds in trust by their land ownership and that they receive water from the Colorado River under the BCPA. All of this has been shown and/or is beyond controversy.

INTERVENORS SATISFY THE REQUIREMENTS FOR INTERVENTION AS A MATTER OF RIGHT UNDER FRCivP 24(a)(2)

A. Standards for Intervention as a Matter of Right

Federal Rule of Civil Procedure 24(a)(2) provides:

> "Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

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The Ninth Circuit uses a four-prong test in applying Rule 24(a)(2):

> "(1) the application for intervention must be timely; (2) the applicant must have a 'significantly protectable' interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit."

Southwest Center for Biological Diversity v. Berg, 268 F.3d 810, 817-818 (9th Cir. 2001) (Emphasis added).

In *United States v. City of Los Angeles*, 288 F.3d 391, 397-398 (9th Cir. 2002), the Ninth Circuit provided the following guidance for applying the four-prong test:

> "In evaluating whether these requirements are met, courts 'are guided primarily by practical and equitable considerations.' Further, courts generally 'construe [] [the Rule] broadly in favor of proposed intervenors.' 'A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a practical interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court.' (Emphasis added, citations omitted).

Courts also should "take all well-pleaded, nonconclusory allegations in the motion to intervene, the proposed complaint or answer in intervention, and declarations supporting the motion as true absent sham, frivolity or other objections." *Southwest Center for Biological Diversity, supra*, 268 F.3d at 820. All of the requirements for intervention as a matter of right under Rule 24(a)(2) are satisfied here.

B. Intervenor's Motion to Intervene Is Timely

The three factors used to determine timeliness are: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for the length of the delay." *United States v. Carpenter*, 298 F.3d 1122, 1125 (9th Cir. 2002), (quoting *County of Orange v. Air Calif.*, 799 F.2d 535, 537 (9th Cir. 1986), *cert denied*, 480 U.S. 946 (1987).) As the declaration of PJM reflects, INTERVENORS went through a good faith process with the other parties to try to reach some accommodation short of filing this motion. Ultimately, after numerous letters and at least one face-to-face meeting, there was no choice left but to move to intervene. Moreover, the recent filings surrounding the motion for the preliminary injunction and its rash of experts commenting on what local farmers may or

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may not be doing correctly and what that means for their continued livelihood militates in favor of the real parties in interest having a direct role in this action. The modest delay occasioned by INTERVENORS' good faith effort to comply with Rule 11 and Local Rule 83.4 should not be held against them. In fact, it is still quite early in the lawsuit, the only substantive decision being the grant of other motions to intervene. *Greenpeace Foundation v. Daley*, 122 F.Supp.2d 1110, 1114 (D. Hawai'i 2000) (motion to intervene less than 3 months after lawsuit filed was timely).

No one can complain of prejudice. The proposed intervenors had made known to the other parties to this action their intent to intervene even before CVWD and MWD moved to do so (i.e., intervenors had no knowledge of the contemporaneous applications to intervene when they authorized the first Rule 11 letter on January 31, 2003). They should not be prejudiced by the fact that CVWD and MWD chose to put less effort into a good faith accommodation about intervention than they. Hence MWD's and SVWD's applications were considered when there were fewer parties in the fray, but that should not be held against INTERVENORS.

C. Intervenors Have Significantly Protectable Interests At Stake

1. Rights to Colorado River Water Are A Significantly Protectable Interest

An intervenor has a "significantly protectable interest" at stake if "(1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the [already existing] claims." *United States v. City of Los Angeles, supra*, 288 F.3d at 398 (quoting *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). "The 'interest' test is not a clear-cut or bright-line rule, because '[n]o specific legal or equitable interest need be established." *United States v. City of Los Angeles, supra*, 288 F.3d at 398 (quoting *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993) (Reinhardt, J., dissenting).) Instead, the "interest" test is primarily "a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *United States v. City of Los Angeles, supra*, 288 F.3d at 398 (quoting *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (internal quotation marks and citation omitted).

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As the Ninth Circuit said in *Southwest Center for Biological Diversity, supra*, 268 F.3d at 820: "Contract rights are traditionally protectable interests." INTERVENORS' section 5 contract rights to Colorado River water through IID are clearly "significantly protectable interests" for purposes of intervention. Indeed, INTERVENORS' water rights are indistinguishable from the water rights that MWD and CVWD claim they must protect.

2. Use of Real Property Significantly Protectable Interest

In fact, INTERVENORS have an even stronger protectable interest at stake than MWD or CVWD – their real property. The *Southwest Center for Biological Diversity* court restated the Circuit's special protection of real property rights in intervention:

> We stressed that the lawsuit would affect the use of real property owned by the intervenor by requiring the defendant to change the terms of permits it issues to the would-be intervenor, which permits regulate the use of that real property. These interests are squarely in the class of interests traditionally protected by law. (Quoting *Sierra Club v. USA*, 995 F.2d 1478, 1483 (9th Cir. 1993)).

Southwest Center for Biological Diversity, 268 F.3d at 819. Instead of an express municipal permit system, the present situation is a limiting allocation system under the Water Code. Water Code § 22250, 22251. Otherwise, INTERVENORS are in the same positions as the would-be intervenors in *Sierra Club* since the outcome of this action will have an immediate and direct effect on their ability to use their land. This is the interest they wish – and the law allows them – to protect.

There also is no question that there is a "relationship" between intervenor's legally protected interest in its Colorado River water and the land to which it is appurtenant and IID's claims and the other parties' defenses. "The relationship requirement is met 'if the resolution of the plaintiff's claims actually will affect the applicant.'" *United States v. City of Los Angeles, supra*, 288 F.3d at 398. (Citation omitted). Because upholding the defenses of CVWD, MWD, and the Secretary will reduce the amount of water that INTERVENORS are entitled to receive under the Secretary's December 27, 2002 decision, the "relationship" requirement is plainly satisfied.

3. INTERVENORS' Interests Under the Other Agreements and Contracts Are Also Protectable Interests That Justify Intervention.

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IID's lawsuit also seeks particular interpretations of agreements and contracts to which INTERVENORS and those like them are intended beneficiaries (or more) as a matter of California law. The other parties seek interpretations that are unfavorable to INTERVENORS' interests. This also justifies intervention wholly apart from INTERVENORS' protectable interest in its Colorado River water contracts. In *Turn Key Gaming v. Oglala Sioux Tribe,* 164 F.3d 1080 (8th Cir. 1999), the Eighth Circuit allowed intervention in comparable circumstances, stating: "The disposition of the lawsuit between [the existing parties] may require resolution of legal and factual issues bearing on the validity of these agreements. It is enough under Rule 24(a) that [the proposed intervenor] could be prejudiced by an unfavorable resolution in later litigation." (Emphasis added).

4. INTERVENORS Have A Protectable Interest In The Enforcement of Reasonable Beneficial Use Requirements

INTERVENORS also have a legally protectable interest in having the reasonable and beneficial use requirements applied properly. Section 13(c) of the BCPA, 43 U.S.C. section 617l(c), provides that all contracts with the United States for Colorado River water "shall be upon the express condition and with the express covenant that the rights of the recipients or holders thereof to the waters of the river . . . shall likewise be subject to and controlled by said Colorado River compact." (Emphasis added) As stated previously, the Colorado River Compact imposes a reasonable beneficial use requirement upon deliveries of Colorado River water to the Lower Basin States, including to INTERVENORS (through IID). Section 13(d) of the BCPA, 43 U.S.C. section 617l(d) also says that Colorado River Compact conditions and covenants that attach to any water contracts with the United States "shall be deemed to be for the benefit of and be available to . . . the users of water [in California and other Basin States] by way of suit, defense or otherwise, in any litigation respecting the waters of the Colorado River." (Emphasis added) Thus, Section 13(d) does two things: (1) it expressly makes water users such as INTERVENORS intended beneficiaries of the Colorado River Compact covenants that bind the Secretary, and (2) it authorizes INTERVENORS to bring suit to enforce those requirements. INTERVENORS' intended beneficiary status is an additional

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basis for intervention. In *Southwest Center for Biological Diversity, supra,* 268 F.3d at 820-822, the Ninth Circuit found that builders and developers could intervene in litigation between environmental plaintiffs and federal defendants over the validity of Endangered Species Act agreements because the intervenors were intended beneficiaries of those agreements. Similarly here, INTERVENORS are by statute, intended beneficiaries of the reasonable and beneficial use requirements and have an interest in seeing that the Secretary lives up to her obligations and limitations thereunder. Therefore, INTERVENORS are entitled to intervene just as much as the developers in *Southwest Center for Biological Diversity.*

D. Disposition of the Action Without INTERVENORS Would Impair or Impede INTERVENORS' Ability To Protect Its Interests

INTERVENORS' interests clearly would be impaired if this suit proceeds without them. If the Secretary prevailed in the litigation, INTERVENORS could not then sue the Secretary. Perhaps INTERVENORS could sue the Secretary and/or MWD right now. But that would generate multiple suits, which is what intervention is designed to avoid. Even if INTERVENORS could bring suit separately, the *stare decisis* effect of a prior decision made here without INTERVENORS would be prejudicial to their interests. See *Sierra Club v. U.S. Environmental Protection Agency, supra,* 995 F.2d at 1486 ("Although the [intervenor] might challenge various determinations in separate proceedings, those proceedings would be constrained by the *stare decisis* effect of the lawsuit from which it had been excluded."

Amicus status also is not an adequate substitute that would protect INTERVENORS' interests. As the Ninth Circuit pointed out in *United States v. City of Los Angeles, supra,* 288 F.3d at 400: "amicus status is insufficient to protect the [intervenor's] rights because such status does not allow the [intervenor] to raise issues or arguments formally and gives it no right of appeal."

The *stare decisis* effect on the trust issues is no less substantial. No one has or can dispute that IID holds the Colorado River water rights in trust and that INTERVENORS and others are the equitable owners thereof. IID Reply brief to Federal Defendants' Opposition to Motion for Preliminary Injunction, p. 15. Under California law, the trustee relationship of an

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irrigation district is for many purposes a routine common law type. *Allen v. Hussey* (1951) 101 Cal.App.2d 457, 468 and 474 (action by individual beneficiaries, prohibits irrigation district from making gift of its trust assets and finding transaction void ab initio even when third party and trustees acted in good faith on advice of counsel). The trust responsibility imposes restrictions on the IID and all who deal with it, especially when such parties are on notice of the limits of IID's authority. Decl. Of PJM, ¶ 2 (Exhibit 1) (letter to parties referencing California trust obligations of IID and *Allen v. Hussey* case).

The trust issues are part of the same claim or controversy. 28 USC § 1367. They are intertwined with the Secretary's decision and her rationale therefore. While the present administrative record does not so reflect, discovery will verify that the Secretary (and/or other federal defendants) received notice of the trust issues well before the December 27, 2002 water order. The record will reflect federal defendants initiated direct contacts with various beneficiaries and correspondence was exchanged between them as to execution of the QSA and other matters under the Interim Surplus Guidelines. The federal defendants were on notice that the beneficiaries disputed IID's authority to bind their water rights, but the Secretary ignored such restraints.

If INTERVENORS are prevented from pursuing the trust issues in this lawsuit, they will be without any real recourse. The seventh claim, for example, contends that IID has mismanaged the trust resources. MWD and CVWD defenses are to some degree similar in that they claim that IID has failed to use its water allocation appropriately. Should INTERVENORS and other beneficiaries not participate in this lawsuit, and an outcome upholding the MWD and CVWD defenses is reached, INTERVENORS may be prejudiced in any subsequent action seeking to hold or surcharge IID as the trustee for the diminution of assets. Pointedly, the Court has allowed CVWD and MWD to make a claim by way of defense that IID is not using its water well, the resolution of which would severely prejudice INTERVENORS' claim of IID's mismanagement of its trust assets.

The claims relating to IID's breach of its duties (the 8th, 9th, 11th and 12th) will suffer a similar fate. The underlying *res* may be substantially lessened or subject to other limitations

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by virtue of this action and whatever breach of trust claims INTERVENORS may bring thereafter about that *res* will be either totally moot or at least severely prejudiced by findings of this Court. The 10th claim of a deprivation of property will be totally foreclosed if IID can establish in this action that the deprivation of its beneficiary's assets was caused by a party other than IID, thus preventing any litigation of that issue by INTERVENORS separately.

It bears emphasizing that INTERVENORS did not choose this forum – IID did. If INTERVENORS are not allowed to litigate their issues against IID that all relate to the water order, QSA, and the negotiations around the limitation of California's allocation from the Colorado river, INTERVENORS will either be wholly unable to litigate such issues or will face prejudice from the decisions reached here. The *res* is squarely at issue, for better or worse, and in order to have any meaningful opportunity to address the *res*, INTERVENORS must act now and in this forum.

E. INTERVENORS' Interests Are Not Adequately Represented By Existing Parties

INTERVENORS' burden of showing that their interests are not adequately represented is "minimal", and is satisfied merely by showing that representation by existing parties "may be" inadequate. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 N. 10 (1972); *Southwest Center for Biological Diversity, supra*, 268 F.3d at 823. In evaluating adequacy of representation a court should look to:

> "(1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect." *Id.* at 822.

There are several reasons why IID cannot adequately represent the interests of INTERVENORS in this litigation. First and foremost, INTERVENORS are in a somewhat adversarial position with IID. It is less than clear whether IID still considers INTERVENORS to be the objects of its duties or not after the revocation of IID's trust responsibility. See ¶ 37 of the proposed pleading.

Second, IID has also taken the litigation tactic (whether warranted or not) that it would withhold addressing allocation for its beneficiaries unless and until this Court rules on the

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preliminary injunction. Decl. Of PJM ¶ 14 (Exhibit 13). That litigation tactic (again, whether good or bad), fails to take into account the needs and realities of the beneficiaries, who must all find ways to live within whatever allocation is ultimately reached. (Even if IID prevails, California is still limited to 4.4 MAF and by extension IID is also faced with some sort of limit, even if not this day.) IID has a short-term outlook, e.g., this election cycle, whereas its beneficiaries have the longest possible, e.g., the easement created on the land by virtue of a diminution of water availability and the depreciation that will go with it.

It bears noting that while the predecessors of INTERVENORS and others created IID under the California Irrigation District Act in 1911, IID by its very structure has not been a landowner oriented district for quite some time. Decl. Of PJM ¶ 5 (Exhibit 4) (Imperial Valley Press article of 12/20/02, quoting John Penn Carter, General Counsel for IID). The voting public, not the landowners, elects its directors. It makes the vast majority of its income from power sales to consumers, not from the sale of agricultural water. IID claims it could politically decide to sell or transfer or compromise the entire water right to benefit its "constituents", i.e., the people who elect the Directors. INTERVENORS dispute IID can do so. Thus, INTERVENORS and others like them are represented by IID in this litigation – if at all -- only to a degree.

Also, IID cannot be expected to make all of the arguments that INTERVENORS would make if INTERVENORS were allowed to intervene. In their proposed pleading INTERVENORS have asserted a claim against MWD -- one that frankly would benefit IID -- that IID had not elected to assert.

Finally, INTERVENORS will offer a necessary perspective on the issues that other parties may neglect. In all of the ink spilled thus far, the beneficiaries have been largely forgotten. IID has most recently been a bit more vocal, but none of the other parties seem to appreciate that whatever happens, it is INTERVENORS and those like them that will bear the brunt of the decision. MWD pays lip service to the farmers in its political overtures, but when asked did not support the present intervention. Decl. Of PJM, ¶ 18 (Exhibit 15). MWD cited

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the failure of IID to work with the farming community as one reason for its view that the QSA negotiations were not productive.

> Given that we are now over five years into the evolution of this proposed transfer, IID should have disclosed long ago a definitive proposal on how the water would be conserved, how farmers would be compensated, what system improvements would be built, etc. Instead, we have been continually told that this deal must be closed before IID will develop or reveal its program and start to seek farmer subscriptions.

Letter of MWD to Thomas Hannigan, Department of Water Resources, February 24, 2003 (page 49). Thus, the actions of MWD reflect that to MWD, IID and its beneficiaries are not one and the same. The administrative record that will be embellished through discovery will also reveal that the Secretary did not consider IID and its beneficiaries one and the same. INTERVENORS and others like them have different interests than IID and for that reason will not be adequately represented in the litigation. In *Turn Key Gaming v. Oglala Sioux Tribe*, 164 F.3d 1080 (8th Cir. 1999), the Eighth Circuit found that even when the intervenors had some level of common interests, the inquiry was whether the level of protection by the already existing party would be adequate. It found, for example, that even a difference in litigation strategy was reason for finding intervention appropriate. *Turn Key Gaming v. Oglala Sioux Tribe*, 164 F.3d at 1082.

Moreover, the proposed intervenors have already "appeared" in the litigation by way of a letter that they sent on the heels of the December 27, 2002 water order. Without delving into the merits of the federal defendants' interpretations of various federal and state laws, the federal defendants and MWD have used (or more accurately, misused and quoted out of contexts parts of) the "Imperial Group" letter of December 30, 2002 to oppose the preliminary injunction. ARI:13:0046. IID, for its part, has "defended" against that letter. Exhibit N to Declaration of Jesse Silva in Support of IID's Reply to Opposition to Motion for Preliminary Injunction. INTERVENORS have already been drawn into the action.

F. INTERVENORS Can Meet Other Intervention and/or Standing Standards

INTERVENORS are in a similar position as the landowners intervenors were in the 160-acre limitations case. *United States v. Yellen*, 559 F.2d 509 (9th Cir. 1977), reversed on other grounds sub nom, *Bryant v. Yellen*, (1980) 447 US 352. The *Yellen* case (there were several

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District Court cases that were ultimately consolidated on appeal) involved the application of the 160-acre limitation to lands in the Imperial Valley. IID opposed the United States, arguing that the 160-acre limitation did not apply. A group of landowners owning more than 160 acres each intervened as members of a class under Rule 23. *United States v. IID*, 322 F.Supp. 11 (SD Ca. 1971). On the merits, the United States lost at trial. The United States then decided to not appeal. A group of non-landowners then sought leave to intervene for the purpose of appealing. While there was contention about this other group of intervenors who intervened to appeal when the United States did not, the decision to allow the landowners intervention in the first instance generated no appeals. The only difference between the procedural posture of the two cases with respect to IID and the landowner intervenors is that at the present time INTERVENORS are not moving under Rule 23 since as trust beneficiaries, they have no need to create a formal class. Since intervention by landowner beneficiaries was appropriate the last time IID litigated against the United States over its water rights, there is no reason to reach a different conclusion now. Proposed intervenors, however, stand ready to meet the requirements of Rule 23(b)(2) if a party opposes their intervention on the basis that they seek class relief, notwithstanding that they are fully capable of litigating as individuals based on their status as trust beneficiaries. Probate Code § 17200

Even under a higher standing standard of pleading, INTERVENORS are nevertheless sufficiently interested in the underlying controversy to have brought the lawsuit in the first place. *Central Delta Water Agency v. United States*, 306 F.3d 938 (9th Cir. 2002). Under the three part standard for standing, INTERVENORS have amply alleged that (1) they have suffered an "injury in fact" (the amount of water ratably appurtenant to their lands has been reduced), (2) there is a casual connection between the injury and their conduct complained of (the reduction is due to the December 27, 2002 water order), and (3) it is likely that the injury can be redressed by this Court (the water order can be undone or modified). Thus, as they have standing enough to be a party in the first instance, they have ample ability to intervene.

In sum, all of the requirements for intervention as a matter of right have been satisfied, and INTERVENORS should be permitted to intervene under Fed. R. Civ. P. 24(a)(2). If

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INTERVENORS are not allowed to intervene, they will lose some or all their water, they will lose their ability to redress their issues with IID, and they will lose to the grab by the Coast for control of INTERVENORS' lands through the substantial leverage over their water rights.

CONCLUSION

For all the foregoing reasons, INTERVENORS' motion for leave to intervene as a matter of right under Fed. R. Civ. P. 24(a) should be granted.

Patrick J. Maloney
Attorney for proposed intervenors

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USDC SCAN INDEX SHEET

BJR 3/18/03 14:00
3:03-CV-00069 IMPERIAL IRRIGATION V. USA
84
DECL.

Patrick J. Maloney, No. 042963
Thomas S. Virsik, No. 188945
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Telephone: 510.444.2897

Attorneys for applicants in intervention
WALTER HOLTZ, MICHAEL MORGAN,
and MICHAEL STRAHM

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IMPERIAL IRRIGATION DISTRICT.

Plaintiff

vs.

UNITED STATES OF AMERICA, GALE NORTON, BENNETT RALEY, and ROBERT W. JOHNSON

Defendants

WALTER HOLTZ, MICHAEL MORGAN, and MICHAEL STRAHM

Applicants in Intervention

Vs.

UNITED STATES OF AMERICA, GALE NORTON, BENNETT RALEY, ROBERT W. JOHNSON, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, and IMPERIAL IRRIGATION DISTRICT,

Cross-defendants

Case No. 03CV0069 W (JFS)

DECLARATION OF PATRICK J. MALONEY IN SUPPORT OF EX PARTE MOTION FOR LEAVE TO INTERVENE

FRCivP 24

Hon. Thomas J. Whelan
Courtroom 7

Opposition, if any, due within five Court days.

84

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I, Patrick J. Maloney, state and declare as follows:

1. I am one of the attorneys for the proposed intervenors in this action.

2. On behalf of proposed intervenors and other clients, on November 6, 2002 I caused to be sent to counsel for IID, MWD, CVWD, SDCWA, several federal officers, among others, a letter raising California trust issues involved in the proposed QSA. A true copy of said letter retrieved from my electronic archive is attached hereto as Exhibit 1, reflecting the persons to whom it was sent.

3. On behalf of proposed intervenors and other clients, on November 21, 2002, I wrote to Ms. Celeste Cantu of the SWRCB seeking assistance from that agency in creating an intra district water allocation system as allowed under California law. Attached to that letter was correspondence exchanged between this office and Hon. Bennett Raley, the Assistant Secretary for Water and Science. A true copy of said letter and its attachments (less the lengthy draft SWRCB decision then extant) is attached hereto as Exhibit 2.

4. On behalf of proposed intervenors and other clients, on December 6, 2002 I caused to be sent to counsel for IID, MWD, CVWD, SDCWA, several federal officers, among others, a letter revoking IID as trustee of my clients' water rights. A true copy of said letter retrieved from my electronic archive is attached hereto as Exhibit 3, reflecting the persons to whom it was sent.

5. On or about December 20, 2002 I read in the online version of the Imperial Valley Press, a daily newspaper published in Imperial County, statements attributed to IID General Counsel John Penn Carter to the effect that if even 90% of landowners for whom IID holds water rights in trust petitioned IID for certain actions, IID would not be obligated to pay any attention to their wishes. A true copy of the article is attached hereto as Exhibit 4.

6. On or about December 30, 2002 I caused to be sent a letter prepared by various clients, including the proposed intervenors, asking Hon. Bennett Raley, the Assistant Secretary for Water and Science, for a clarification of the December 27, 2002 water order. A true copy of this letter is attached hereto as Exhibit 5.

7. On behalf of proposed intervenors and other clients, on January 8, 2003 I

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caused to be sent to Hon. Bennett Raley a letter emphasizing my clients' opposition to the December 27, 2002 water order and seeking assistance for the creation of an intra district water allocation system. A true copy of this letter is attached hereto as Exhibit 6.

8. On behalf of proposed intervenors and other clients, on January 8, 2003 I caused to be sent to counsel for IID a letter emphasizing my clients' opposition to the December 27, 2002 water order. A true copy of this letter is attached hereto as Exhibit 7.

9. On behalf of proposed intervenors and other clients, on January 31, 2003 I caused to be sent to counsel for IID and the US Attorneys office under the rubric of Federal Rule of Civil Procedure 11 and Local Rule 83.4 a letter attempting to negotiate in good faith a means for protecting my clients' interests in this action. A true copy of said letter retrieved from my electronic archive is attached hereto as Exhibit 8.

10. On behalf of proposed intervenors and other clients, on February 4, 2003, I caused to be sent to Messrs. Macfarlane and Gheleta of the US Attorneys Office a transmittal letter along with the January 31, 2003 letter referenced above. A true copy of said letter retrieved from my electronic archive is attached hereto as Exhibit 9.

11. On behalf of proposed intervenors and other clients, on February 6, 2003 I caused to be sent to counsel for MWD and CVWD a transmittal letter along with the January 31, 2003 letter referenced above. A true copy of said letter retrieved from my electronic archive is attached hereto as Exhibit 10,

12. On or about February 10, 2003 I received a response from Mr. Macfarlane on behalf of the federal defendants, a true copy of which is attached hereto as Exhibit 11.

13. On behalf of proposed intervenors and other clients, on February 17, 2003 I caused to be sent to counsel for IID, MWD, CVWD and the US Attorneys office under the rubric of Federal Rule of Civil Procedure 11 and Local Rule 83.4 another letter attempting to negotiate in good faith a means for protecting my clients' interests in this action. A true copy of said letter retrieved from my electronic archive is attached hereto as Exhibit 12.

14. On or about February 18, 2003 I was provided with a copy of a press release from IID stating that IID had chosen to not develop a water allocation system, and was

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instead going to address allocation if and when it lost the preliminary injunction. A true copy of said press release is attached hereto as Exhibit 13.

15. On behalf of proposed intervenors and other clients, on February 19, 2003 I caused to be sent to IID a letter again attempting to negotiate in good faith a means for protecting my clients' interests in this action. A true copy of said letter retrieved from my electronic archive is attached hereto as Exhibit 14.

16. I met with various clients and representatives of IID thereafter in follow up to said letter, the content of which meeting(s) and communications are privileged.

17. On or about February 24, 2003 I received a copy of the first four pages of a letter from MWD to Thomas Hannigan of the California DWR. A true copy of those first four pages is attached hereto as Exhibit 15.

18. On or about February 26, 2003 I received from Counsel for MWD a response to my prior Rule 11 letters, a true copy of which is attached hereto as Exhibit 16.

19. On March 10, 2003 I caused to be sent a letter to counsel for SDCWA and others providing notice that several of my clients were preparing to intervene. A true copy of said letter is attached hereto as Exhibit 17.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed in Alameda, California on the date written below.

Date: 3-11, 2003

Patrick J. Maloney

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TABLE OF CONTENTS TO EXHIBITS ATTACHED TO DECLARATION OF PATRICK J. MALONEY IN SUPPORT OF EX PARTE MOTION TO INTERVENE

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THOMAS S. VIRSIK

November 6, 2002

Counsel for San Diego County Water Authority
Scott Slater
Hatch & Parent
21 East Carillo Street
Santa Barbara, CA 93101

Counsel for Metropolitan Water District of Southern California
Ellison, Schneider & Harris
2015 H Street
Sacramento, CA 95814

Counsel for Coachella Valley Water District
Redwine & Sherrill
1950 Market Street
Riverside, CA 92501

Counsel for Imperial Irrigation District
David Osias
Allen, Matkins et al.
501 West Broadway, Suite 900
San Diego, CA 92101

Re: Transfer of water between IID and SDCWA
Public Records Act request

Dear gentlepersons:

On behalf of our landowner clients in the Imperial Valley, we are contacting you about several matters relating to the proposed transfer, the QSA, the "term sheet" negotiated under the guidance of former speaker Herzberg, and related agreements (sometimes collectively referred to as "the transfer"). We understand from media accounts that some or all of you other than IID approved the term sheet and/or other components of the transfer a week or two ago.

Notice of Interest in Matters

As you are likely aware, our clients own land in IID and thus are among the beneficial owners of the water rights subject to the transfer. Bryant v. Yellen, (1980)

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447 US 352 at n. 23, Water Code § 22437. They are thus by definition parties interested in the transfer as the transfer affects their property rights, i.e., their "res," for purposes of any validation action seeking to affirm or invalidate any part of the transfer. Recently enacted SB 482 recognizes as much in tying all of the components of the transfer together under the heading of the QSA and making them interlocking. Sections 1 and 8 (new Water Code § 22762). You are hereby notified that in the event any of you file a validation action under the provisions of SB 482 or under the authority of your individual organic authority, we demand immediate formal written notice thereof.

Documents (as to SDCWA, CVWD, and MWD only)
Please provide to us under the Public Records Act the resolutions or other action(s) taken approving the term sheet as reported by the media. If the media was inaccurate, obviously please let us know. We would like copies of the staff report, publication notice, minutes, transcripts, tape recordings of the hearing(s), roll call, and whatever other materials reflect on the formal action taken that are a part of the administrative record within the meaning of your agency's statutory or other organic authority. We are prepared to pay for the copies. If you anticipate that you will be unable to meet the statutory deadline, please immediately advise.

Notice of Trust
Please also note that the transfer and all parts of it are subject to the trust provisions to the landowner beneficiaries imposed under the Water Code and other authority. You all have notice of the trust provisions from the explicit reliance on the trusteeship of IID in the SWRCB regulatory proceeding since at least 1998, among other forms of notice. The trust responsibility imposes restrictions on the IID and all who deal with it in transferring any of the beneficiaries' assets, i.e., the water or water rights. Allen v. Hussey (1951) 101 Cal.App.2d 457, 468 and 474 (prohibits irrigation district from making gift of its trust assets and finding transaction void ab initio even when third party and trustees acted in good faith on advice of counsel). You are formally notified that the present "term sheet" purports to give away trust assets under various guises and is thus ultra vires under the IID's organic authority.

Contact with Officials
Rule of Professional Conduct 2-100(C)(1) allows direct communication between an attorney and a represented party who is a public official, i.e., all of the Directors and other officials of the various water entities. If your local practice differs from the state rule, please let us know and provide to us the written policy reflecting such practice.

Sincerely,

Patrick J. Maloney

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Encl.

c.

IID Board Member Allen

IID Board Member Horne

IID Board Member Kuhn

IID Board Member Maldonado

IID Board Member Mendoza

County of Imperial
County Counsel's Office
940 Main Street, Suite 205
El Centro, CA 92243

Counsel for IID
Horton, Knox, Carter & Foote
895 Broadway, Suite 101
El Centro, CA 92243

Robert Johnson, Regional Director
Lower Colorado Regional Office
PO Box 61470
Bounder City, NV 89006-1470

Hon. Bennett Raley
Assistant Secretary – Water
1849 C Street NW
Washington, DC 20240

Ms. Lauren Grizzle
IVWUA
1036 Capra Way
Fallbrook, CA 92028

Palo Verde Irrigation District
180 West 14th Avenue
Blythe, CA 92225

Celeste Cantu, SWRCB,
(In re: Petition under Permit 76433, Application No. 7482)
PO Box 100
Sacramento, CA 95814

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THOMAS S. VIRSIK

November 21, 2002

Ms. Celeste Cantu
Executive Director, SWRCB
P.O. Box 100
Sacramento, CA 95812

Re: Our conversation of November 20, 2002.

Dear Ms. Cantu,

This letter is a follow up of to our conversation of November 20, 2002. In our conversation I indicated I would send you the information relating to the Bell Curve Memo on water usage in the Imperial Valley. I received the Bell Curve information from John Grizzle. It is my understanding the Bell Curve information came from IID. To date we have analyzed all Imperial County Assessor's records of agricultural land in Imperial County and compared portions of client records against billings of IID. There appears to be material differences in the Agricultural land reported by Imperial Irrigation District and the County Assessor's office as well as other Governmental Agencies. In our public records request to IID which we heretofore sent to you, we are trying to obtain all of the supporting information on which the Bell Curve memo was based. We are still negotiating with IID on various aspects of the request including but not limited to water and land use data. Once we obtain this water and land use data from IID we will revisit the Bell Curve Memo.

During our conversation I discussed in general the need for a Quantification program for Water Use in IID with an Intra-District Water Bank. I have enclosed a Draft memo prepared by our economist, Professor Reinelt, on this issue. The Draft Memo also discusses a method of determining the value of water to landowners in IID, which you might find interesting. With this letter I am reiterating the request for technical assistance from the SWRCB to help develop a Quantification Program and Intra-District Water Bank. If the SWRCB would like to discuss any portion of the Draft Memo with Professor Reinelt we will make him available.

I have also included our correspondence with Assistant Secretary Bennett Raley for your information because it is my understanding these letters have been released to the media by somebody, i.e., we did not release them to the media.

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Again I would like to reiterate my belief that based on conversations with our clients we firmly believe a Water Transfer can be accomplished which would have positive benefits to all citizens of Imperial County if all parties to the transfer behave in a reasonable matter.

I am

Sincerely

PATRICK J. MALONEY

C
Hon. Bennett Raley
Assistant Secretary – Water
1849 C Street NW
Washington, DC 20240

Encl.

Bell Curve Memo
Reinelt draft memo
November 11, 2002 letter to Hon. Bennett Raley
November 11, 2002 draft memo (w/ IID Petition for Cert.)
November 13, 2002 letter from Hon. Bennett Raley

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THOMAS S. VIRSIK

Via fax and UPS
November 11, 2002

Hon. Bennett Raley
Assistant Secretary – Water
1849 C Street NW
Washington, DC 20240

Re: Transfer of water between IID and SDCWA
QSA

Dear Mr. Raley:

On behalf of our landowner clients in the Imperial Valley, please find a draft memo we discussed last week on the telephone about the relationship of the landowners of IID to the Department of the Interior. The appendixes to the memo are being sent in the overnight package.

We would like to be able to discuss with you the memo on the afternoon of Wednesday, November 13, 2002.

Sincerely,

Patrick J. Maloney

Encl. DRAFT memo
w/ appendixes (UPS only)

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MEMORANDUM - draft

November 11, 2002

Re: Federal relationship to and status of landowners in IID; implications to QSA

Question: Does the Department of the Interior (sometimes DOI) have authority to negotiate directly with the landowners of the Imperial Irrigation District (IID) with respect to the QSA?

Conclusion: The holding and rationale used to reach that holding in Bryant v. Yellen (1980) 447 US 352 allows the DOI as a matter of federal law or the law of the river to enter into a direct relationship with the landowners in the service area of the IID. This direct relationship can include agreements tantamount to those of the QSA.

Background: For purposes of this memo, the background contained in the series of Supreme Court decisions defining the intricate water relationships in the Colorado River as it relates to IID is assumed. Arizona v. California (1963) 373 US 576 and its progeny and revisions at the Supreme Court. Those relationships are defined, inter alia, in the Colorado River Compact and the Seven Party Agreement. The QSA or Quantification Settlement Agreement is the as yet unexecuted agreement among the IID and several other California water users of the Colorado River setting specified amounts and priorities in connection with a planned transfer of conserved water from the IID to the San Diego County Water Authority (SDCWA). Another reason for the QSA is to place limits on Colorado River water by the California entities so that California reduces its historic overuse of the amount to which it is entitled under the Seven Party Agreement. If the QSA is not signed by all of the participants by December 31, 2002, DOI will take measures to unilaterally bring California's take of Colorado River water into compliance.

The water transfer between IID and SDCWA has been approved by the regulatory California agency which has jurisdiction over such transfers, the State Water Resources Control Board (SWRCB). While the decision of the SWRCB is not yet final, it is expected to be final by December 31, 2002. The decision approves the transfer subject to certain environmental and other contingencies, but by no means is forcing or even recommending the transfer of conserved water go forward. The IID, the SDCWA, and the other parties that are to be signatories of the QSA have

agreed in principal to consummate the water transfer transaction by December 31, 2002, but IID has thus far failed to follow through. The transfer is politically and otherwise controversial in the Imperial Valley and there is a substantial likelihood that the IID will fail to act by the December 31, 2002 deadline.

Analysis: The crux of the authority of the DOI to interact with landowners in the Imperial Valley, i.e., the service area of IID, arises from the holding and the rationale used to reach that holding in Bryant v. Yellen. That holding was a reversal of the underlying Ninth Circuit opinion, including conclusions about the nature of the relationship of the IID to its landowners under California law.

The Court was not bashful in concluding that the Ninth Circuit was absolutely wrong in its understanding of the relationship of the landowners to IID under California law. Part III of Yellen. Under the Irrigation District Act which supplied IID's authority, IID holds legal title to district property — in this case the present perfected and other water rights recognized in the Arizona v. California decisions and decrees – but landowners retain the equitable title. That equitable title is a true property right, as the equitable water right is appurtenant to the land in IID. Yellen, n. 23. The Court relied on California law to reach this conclusion, none of which has changed. Water Code § 22437.

With respect to the PPR, unlike other species of California pre-1914 water rights (California created a new system of perfecting water rights under the Water Code effective 1914), by virtue of the Arizona v. California decisions, the landowners do not have a right to a set maximum quantity, but rather to a proportion of the IID's PPR. In other respects, the pre-1914 water right of the IID has the same characteristics as all other California pre-1914 appropriative water rights. See Hutchins, Wells A., The California Law of Water Rights, (1956, State of California), pp. 175-177 for description of parameters of pre-1914 appropriative rights. See also, SWRCB draft decision of October 21, 2002, at page 53 and note 12, in which the SWRCB confirms the Hutchins historical view that one can change the place of use of an appropriative pre-1914 right without seeking regulatory approval.

With respect to the non-PPR rights, California law makes no distinction between pre-1914 rights and Water Code (or other) rights held by an irrigation district. Water Code § 22437 (all property held in trust). Thus, while there are some important differences in the manner in which the pre-1914 and later water rights may be exercised by the landowners (or IID), there is nothing in California law or in Yellen that militates a different conclusion about the landowners' entitlement to Project water (i.e., water in excess of the PPR). IID was careful to make no such distinctions when it presented its issues to the Court. See IID's Petition for Writ of Certiorari, September 14, 1979, below.

The Ninth Circuit, on the other hand, concluded that the water rights of IID were held for a "class" rather than being appurtenant to the land. The entirety of the Ninth Circuit rationale is set forth below:

No individual landowner in the Imperial Valley has filed a claim to water from the Colorado River under the terms of the Supreme Court's decree in Arizona v. California, supra, 376 U.S. 351-352, 83 S.Ct. 1468, and there are no records of individual claims by Imperial Valley landowners for water rights as of June 25, 1929. Under California law, the Imperial Irrigation District holds legal title to the rights to Colorado River water in trust for the landowners. Merchants National Bank of San Diego v. Escondido Irrigation District, 144 Cal. 329, 334, 77 P. 937, 939 (1904). The water rights themselves are not held in trust for any individual landowner. The equitable ownership of the water rights is held in common by all the landowners in the District, Id. These principles of ownership have been specifically applied to the Imperial Irrigation District. Hall v. Superior Court, 198 Cal. 373, 383, 245 P. 814, 818 (1926).

The concept of an irrigation district's ownership of water rights in trust for the common benefit of landowners within the district is derived from the California doctrine that the use of appropriated water is a public use. Thus, the users of water, the rights to which are held by an irrigation district in trust for the common benefit, do not possess rights to the water that can be considered private property in the ordinary sense of the words, nor do the lands irrigated by that water thereby obtain any absolute right to the continued delivery of water. Landowners within an irrigation district do not possess as part of their freehold estates a proportionate ownership in the water rights owned by the irrigation district. The right of any individual landowner to the use of water, which must be a public use, comes about by reason of the landowner's status as a member of the class for whose benefit the water has been appropriated. Madera Irrigation District v. All Persons, 47 Cal.2d 681, 691-693, 306 P.2d 886, 892-893 (1957), reversed on other grounds sub nom., Ivanhoe Irrigation District v. McCracken, supra; Jenison v. Redfield, 149 Cal. 500, 87 P. 62 (1906).

A consequence of this rule is that no particular landowner or particular piece of land is entitled to use any particular proportion of the water to which the irrigation district owns rights. As new landowners and as new lands come within the jurisdiction of the irrigation district, they are entitled to use their proper share of the water, and the shares of all landowners would have to be redistributed. Madera Irrigation District v. All Persons, supra, 47 Cal.2d at 692,306 P.2d at 893.

It follows that all the present perfected rights owned by the Imperial Irrigation District as of June 25, 1929, are not water rights owned by any particular landowner. Satisfaction of the Imperial Irrigation District's present perfected rights by the Secretary of the Interior in the

> allocation of Colorado River water therefore only concerns the total quantity of water to be supplied to the Imperial Irrigation District and does not concern supplying any particular amount of water due to any particular landowner. The excess land provisions of Section 46, however, apply only to individual landowners and do not, under the Project Act, apply to the Imperial Irrigation District as the owner of water rights in trust for the common benefit. Excess lands of a particular landowner could be deprived of water without reducing the total amount of water delivered to the Imperial Irrigation District. The District would have to redistribute its deliveries if certain lands became ineligible for delivery of water, but the satisfaction of the District's total present perfected rights would not be impaired by the operation of Section 46. Furthermore, redistribution of deliveries in accord with the excess lands provisions of Section 46 would not violate the trust under which the Imperial Irrigation District owns the water rights for the common benefit. Ivanhoe Irrigation District v. All Parties and Persons, 53 Cal.2d 692, 712, 3 Cal.Rptr. 317, 350 P.2d 69, 81 (1960). Section 6 of the Boulder Canyon Project Act, therefore, does not preclude application of the excess lands provision of Section 46 of the Omnibus Adjustment Act of 1926.

United States v. Imperial Irrigation District, 559 F.2d 509, ___ (9th Cir. 1977).

The Court left no part of the Ninth Circuit's rationale intact. It held that under the Project Act, the PPR were in the first instance defined as a matter of state law. "[S]tate law was not displaced by the Project Act and must be consulted in determining the content and characterization of the water rights that was adjudicated to the District by our decree." 447 US 352, 371. The Court found that under California law no individual farmer was entitled to a set quantity, but rather to a proportion of IID's water. Id.; see also n. 23. The Court held that Congress did not intend to change the characteristics of the state water rights, which included for purposes of the immediate question in Yellen that no state law contained a 160 acre (or any other) limitation. Id. at 372.

The support for the Court's conclusions -- found in several places in and most succinctly at footnote 23 of the Yellen decision that the landowners have an equitable property right to the waters of IID -- comes directly from IID. In its petition for a writ of certiorari, IID made an unequivocal showing that IID is a mere agent (albeit one with fiduciary responsibilities) for the landowners by virtue of California law.

> The court of Appeals makes two interlocking errors (i) in failing to recognize that under California law the rights of the landowners to water delivered by irrigation districts are property rights, not amorphous memberships in a class; and (ii) in failing to recognize that under federal law the rights of the landowners are rights which the

> Project Act directs the Secretary to serve, and precludes him from taking. This Court's two decrees in Arizona v. California implement that mandate.
>
> The court's conclusion that application of acreage limitations to individual landowners (as distinguished from the District) would not impair present perfected rights is premised on a misunderstanding of the nature of water rights "owned" by irrigation districts in California. Although it is true that the District holds the legal title to the water rights, it holds this title in trust for the landowners, who own the beneficial interest. It is the individual landowner – not the District – who puts the water to beneficial use. Under California law, each individual landowner has a statutory right to a definite proportion of the District's water. And each individual landowner has a statutory right to assign his proportionate share. Moreover, the right to such proportionate share becomes appurtenant to the land upon which the water is used.

IID's Petition for Writ of Certiorari, September 14, 1979, pp. 15-17 (footnotes omitted).

The Court considered IID's showing and agreed 100% that the landowners were the measure by which to analyze whether the Project Act's 160-acre limitation applied. The Court squarely rejected the Ninth Circuit's conclusion that the water rights of the landowners were not actual rights and were not appurtenant to the land, having treated the landowners as a mere "members" of a class with no individual rights. The Court looked at the imposition of the 160-acre limitation on landowners, not on its effect on IID. The Court treated IID – because IID had so demanded – as transparent, with the real party the landowners. IID has admitted and the Court reached a decision that necessarily relied on IID's admissions and showings of landowners' equitable property rights. Any notion that the IID is beholden to a "class" of persons or interests other than the lands of its service area is flatly contradicted by the Yellen holding and rationale.

Since as a matter of federal law (Yellen) the landowners are entitled to a proportionate share of the waters of the Colorado River adjudicated to IID, there is no impediment to direct contacts or agreements between DOI and landowners as to their proportionate share of IID's water. The landowners are capable as a matter of federal law of exercising the proportion of IID Colorado River water to which their lands are entitled, hence an agreement by DOI with 50% of the land is as a matter of federal law an agreement as to 50% of the IID water right.

Moreover, since the IID is aware through letters of the landowners that the landowners do not agree with all of the terms of the transfer, it is unable to execute the QSA at this time. QSA Warranties of IID, Part 5.1. The landowners could deliver a sufficient amount of land "proxies" to DOI either approving or rejecting

the QSA and/or its component parts such that the DOI would be prohibited from accepting the QSA from IID in the face of such protest, since as a matter of the law of the river (Yellen), DOI's relationship to IID is only as the landowners' agent. Hence, if the principals (landowners) do not authorize the agent (IID) to act and DOI knows so, it cannot accept the agent's proffers.

A separate agreement with the landowners that recites that the IID is authorized to execute the QSA should allow IID to qualifiedly meet its warranties thereunder and DOI to accept the QSA.

Appendices:

- IID Petition for Writ of Certiorari, September 14, 1979
- Excerpt from The California Law of Water Rights
- SWRCB draft October 21, 2002 decision in Re: Water Transfer, Permit 7643 on Application 7482 of IID

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October 21, 2002

Patrick J. Maloney
Law Offices
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MEMORANDUM
Comments on Structure of IID Water Trade and Internal Water Market

[Mike-This is an in-progress memo to give you some idea of what I have found and am still looking into. For internal comment only.]

This memo is written to inform possible choices in the structuring of a water lease/trade agreement.

Economic Background
The marginal value of water is the incremental value of consuming another unit of water. An economic incentive for water trades exists when the distribution of the rights to use water are different from the distribution of the marginal values of water. In this case, parties with the higher marginal value but lower rights to water will buy water from the party with the lower marginal value but higher water right at a price intermediate to the two values and both parties will be better off. Therefore, water trades can economically benefit both parties and improve economic efficiency if institutional mechanisms to trade water based on secure water rights can be developed. Moreover, the mechanism must not create transactions costs that are greater than the difference between the higher marginal value use and the lower marginal value use or the gains from trade are lost.

Typically in California, the marginal value of water supplied in a city (as measured by the willingness to pay WTP for another unit) is greater than that in agriculture (farmers will forego their least valuable uses of water first). Therefore, an economic incentive exists to trade water between farms and cities.

Moreover, even within a single irrigation district, differences in marginal value also exist. The marginal product of water is the incremental increase in agricultural output of an additional unit of water. The value of the marginal product of water is the increase in profits (revenues minus costs) that result from an additional unit of water. Within irrigation districts, there typically is a distribution of profits per additional acre-foot of applied water due to different crops, differences in land quality and availability,

differences in water management practices, and differences in the initial allocation of water rights. Therefore, within an irrigation district, an opportunity also exists for both parties to water trades to benefit. Additionally, a water market creates an incentive for more economically efficient use of water. The ability to trade allows a farmer who installs efficient irrigation systems or improves water application management processes to benefit by selling the water saved. This also "creates" additional water to be used within the district without lowering agricultural output.

The following diagrams illustrate these situations.

INTERREGIONAL OPTIONS (Trade between IID and SDCWA)

Quantity

1) Commitment to deliver 200 to 300 KAF as a district.
2) Ask individual farmers the quantity they are willing to sell a specified prices ($200, $300, $400/AF.) If farmers total quantities exceed 200 or 300 KAF, then a mechanism for apportionment of water sold needs to be determined.
3) Is quantity the same for all water year types (wet, dry, normal)? Or is quantity determined by year type or the Colorado River allotment to IID?

Price

1) District negotiates price with SDCWA in an attempt to find the maximum WTP of urban consumers for the quantity delivered. Since SDCWA is acting as an agent for urban consumers and IID acts as agent for agricultural consumers, both parties have market power and negotiating skills will effect the outcome. SDCWA has a weaker negotiating position if the federal threat to remove 600 KAF of water by December 31, 2002 is credible.
2) If payments occur over time, price should be linked to an inflation index (possible choices: producer price index, GDP deflator, consumer price index, or regional versions of one of these indices).
3) Other considerations
   a) Length of contract
   b) Different prices based on year type

Apportionment of quantity to sellers

1) If district negotiates quantity independent of asking farmers the quantity that they are willing to sell, then quantity reduction
   a) Most likely will be apportioned to each acre proportionally.
   b) Could also depend on water rights, but it is my understanding the differential water rights are not established based on historical quantity of beneficial use by farm. In other words, within each class of use (agric., municipal, industrial) there is no differentiation among quantity of water rights (less likely to be meaningful for industry because scale is not tied to acreage).
2) If quantity sold is based on farmers stated willingness to sell, then the negotiated quantity can be apportioned to the farmers that are willing to sell at the final price.
   a) Proportional to the quantities stated by farmers, or

b) Proportional to acreage.

Accounting of Quantities
IID keeps accounts of the water allotment for each farm based on year type and quantity transferred to SDCWA.

Length of the Agreement
The choice of the length of the agreement can be influenced by a number of factors.

1) Price risk
   a) Short-term agreement—farmer faces risk in future price—as water markets develop other irrigation districts may offer water (increase in supply) but SDCWA population will grow and other urban districts may be willing to bid for water (increase in demand). Overall, price seems more likely to increase as it is expected that water will become economically more scarce over time.
   b) Long-term agreement—no price risk.
2) Security of water right
   a) Short-term agreement
      i) If water right becomes insecure, very little of the present value (or capitalized value) of the right has been captured.
      ii) May be easier to maintain right after short-term agreement.
   b) Long-term agreement
      i) If water right becomes insecure, most of the present value of the permanent right (the capitalized value of the right) is still captured through its long-term lease. (Increasing political power of environmental and urban interests may eventually try to grab the water without full compensation. Even if the right cannot be retained after the lease most its value has been.)

Percent of Permanent Right Present Value Received	4% Interest Rate	6% Interest Rate	8% Interest Rate
25-Year Lease	62.5	76.7	85.4
50-Year Lease	85.9	94.6	97.9
75-Year Lease	94.7	98.7	99.7

      ii) May be more difficult to maintain right after long-term agreement.

Considerations of Effects on Third Parties (including the environment)
The greatest impediment to successful interregional water trades is impacts on third parties because of the "no injury rule." The transfer of the point of use resulting from a water trade can affect third parties; in particular, water trades can affect return flows, groundwater usage, and water quality. In addition, tenant farmers and the local economy can be affected.

1) Since the 1998 agreement collapsed because of reduced agricultural runoff to the Salton Sea, a politically/judicially viable agreement needs to maintain runoff in the

face of environmental concerns. Therefore, the return flow quantity associated with the prior application of the total quantity transferred to SDCWA needs to be maintained. In essence, only "consumptive use" quantities may be traded while maintaining return flows at the previous level. Thus, the reduction in deliveries to farmers is 200,000 AF plus the associated return flow quantity. To compensate for this reduction in deliveries an environmental surcharge should be added to the negotiated price so the SDCWA also pays for this in-stream flow requirement.

2) Transfer will also likely reduce IID electricity generation revenues. Compensation for this loss with an additional surcharge should be considered. This is complicated by the question of who has rights to the water and the inherent energy it possesses. In any case, IID has made irreversible investments based on previous water flows.
3) Investigate whether runoff water quality (concentration of agricultural effluents) will be affected by agreement.
4) Substitution of groundwater for traded surface water has been a problem in other districts (for example Westlands). Is this a potential problem in IID? What is the groundwater situation?
5) Depending on the length of the lease for tenant farmers, they should be compensated for losing water and the use of some of their capital investments. They should benefit from the trade for the length of their lease.

Fallowing of Land

No specification to fallow any quantity of land. Recent attempted agreements between IID and SDCWA have focused on fallowing a certain percentage of land. Rather, in-stream flow requirements to Salton Sea, associated only with the quantity of water transferred to SDCWA, will be compensated by SDCWA as part of the trade agreement. Then let an internal market reallocate water within the District to the most valued use. The ability to sell water within this market will create greater incentives for more efficient use of water through changes in irrigation technology and water management practices. Land that may be initially fallowed after the transfer may come back into production as more efficient use of water occurs.

INTRAREGIONAL OPTIONS (Trade within IID)

There is also potential for trade between farmers within IID that can make both parties better off because there are higher and lower value uses of water that may not be distributed the same as the rights to that water. With water more limited following a transfer to SDCWA, the potential benefit of these trades to both parties is greater.

Only the right to use a specified amount of water for a particular water year is traded. The water right to a portion of the District's total allocation is not traded. The buyer pays the seller for the right to use the specified amount and must also pay the District the standard delivery charge for that quantity of water. If the traded water is not used during the specified water year, the right to use that water expires. (Or does IID have much dedicated storage capacity? Then the right to the storage also needs to be apportioned.)

Groundwater impacts: if buyer and seller overlie same aquifer, effect is only a shift of location of pumping from same aquifer with no recharge changes.

Any impact on return flows from within district trading?

Computer Trading System

An intra-district trading system should be established similar to "WaterLink" in the Westlands Irrigation District. WaterLink functions as an electronic bulletin board for water trades and is managed by an administrator. Users access WaterLink with their home computers. WaterLink functions as follows.

1) Buyers and sellers email a standard form to the administrator to post quantities that they are willing to buy and sell.
2) Administrator reviews the form and posts the information under water wanted or water for sale.
3) The listings include phone numbers or email addresses
4) Buyers and sellers negotiate price and quantity of trades through bilateral private communications.
5) No requirement to report the price of the trade to the District.
6) Quantity of the trade is reported to District and confirmed by both buyer and seller.
7) District accounts for the trade by adjusting the allotment of both the buyer and seller.
8) District posts quantity weekly and seasonal water market statistics: number of transactions, quantity traded, and average price (if available).

Other possible features

1) Schedule water deliveries with District.
2) View previous water deliveries and water account balances.
3) District can post useful information for farmers (current and past years district river allotment, rainfall summaries, storage levels, CIMIS information, etc.)

Water Delivery Infrastructure

1) For accounting of water to function, all deliveries must be metered.
2) The distribution system must be able to respond in a timely manner to requests for delivery to all parts of the system.
3) The District cost for transporting water should not change greatly with trades.

Effect of No Posted Price

Not publicly posting prices along with quantities (for example bid and ask prices similar to the stock market resulting in a current "market price") has both positive and negative consequences.

1) Buyers and sellers are able to maintain some privacy with respect to water trades.
2) Buyers and sellers have to expend resources to collect market information to choose price.
3) Transaction costs are higher. Farmers must contact potential trading partners individually and possibly negotiate with many potential trading partners to find the best price.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

November 12, 2002

Patrick J. Maloney
2425 Webb Avenue
Suite 100
Alameda Island, CA 94501-2922

Dear Mr. Maloney

I received your November 11, 2002 letter, draft memo, and attachments. Insofar as the memo is primarily a legal analysis, I will not be able to comment on the contents of the memo. From a policy perspective, the memo seems to infer that the Department contemplates that it will enter into agreements directly with landowners in the Imperial Irrigation District. Setting aside the issue of whether such agreements would be within the authority of the Department, you should be aware that we are not presently contemplating any such agreements.

Please feel free to call me if you have any questions regarding the Department's position on issues relating to the implementation of the Secretary's responsibility to administer the lower Colorado River.

Sincerely,

Bennett W. Raley
Assistant Secretary for Water and Science

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Via fax 760.482.9611 and mail
December 6, 2002

Members of the Board of
Imperial Irrigation District
1284 Main Street
El Centro, CA 92243

Re: Revocation of IID's Trustee power.

Dear Honorable Board Members:

As you may be aware, this office represents various landowners in the Imperial Valley. We will be supplying you with a list of APNS to which this revocation applies.

As IID has amply admitted over the past decades, it is a trustee of the water rights appurtenant to the lands in the District. It is therefore subject to not only the Irrigation District Act, the limitations recognized in various caselaw (Yellen being an obvious one), but also the common law of trusts and its present codification in the Probate Code. Allen v. Hussey (1950) 101 Cal.App.2d 457. As a matter of California law, all trusts are revocable and modifiable unless the trust instrument expressly states otherwise. As successors to the settlors (i.e., original landowners) that created the IID, we are revoking IID's powers as trustee over any water rights appurtenant to our clients' lands.

This revocation is not intended to revoke IID's powers over any other assets or to change its responsibilities under the District Law or other authority. We are not petitioning for reorganization or a change of political structure, but are limiting the directive to strictly trust matters. If IID requires that the

revocation take some other form or has in its possession an instrument that recites a different method of making trust changes, please immediately provide to us that instrument. If you do not intend to honor the directive of the settlors-beneficiaries, please advise so that they may take appropriate action.

We remain, as always, willing to discuss terms on which the water transfer may be salvaged.

Sincerely,

PATRICK J. MALONEY

c.

IID Board Member Allen

IID Board Member Horne

IID Board Member Kuhn

IID Board Member Maldonado

IID Board Member Mendoza

David Osias (via fax)

William Swan (via fax)

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Hon. Bennett Raley
Assistant Secretary – Water
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Washington, DC 20240

Ms. Lauren Grizzle
IVWUA
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Palo Verde Irrigation District
180 West 14th Avenue
Blythe, CA 92225

Celeste Cantu, SWRCB,
(In re: Petition under Permit 76433, Application No. 7482)
PO Box 100
Sacramento, CA 95814

December 20, 2002

Menvielle calls on IID to counter water revolt

By RUDY YNIGUEZ

Staff Writer

The Imperial Irrigation District Board of Directors was asked Thursday to promptly respond to local landowners seeking to revoke the water rights trust the board holds.

Calexico-area farmer John Pierre Menvielle asked the board to take immediate action to counter a 60-day joint effort to wrest the water rights from the IID by the so-called Imperial Group and Imperial Valley Water Users Association.

"As you know, that would destroy the Imperial Valley," Menvielle said, adding that one way the groups are trying to obtain ownership to the water is through allocation to the gate. "As a third-generation farmer here in the Imperial Valley, I am totally against that."

Menvielle said there are local farmers urging others to join Imperial Group or IVWUA lest they get left out after control of the water is taken.

"You guys have the power to stop this," he said. "It's about time you put your foot down and stop the BS."

Menvielle asked IID Chief Counsel John Penn Carter what actions could be taken to stop such efforts if 90 percent of the landowners join the two groups.

Carter said in his 35 years with the district, the same issue has come up many times and his answer has always been the same.

"The landowners do not own the water, period," he said.

Brawley-area farmer Mike Morgan heads up the Imperial Group. The group has retained an Alameda Island-based attorney, Patrick J. Maloney, whom Menvielle said visited his home and asked him to join the effort.

"I said, I'm with Farm Bureau and I'm behind the district," Menvielle said he told Maloney.

Maloney would only say he did talk to Menvielle.

"I was instructed to go to that meeting at the suggestion of a third party," Maloney said, adding he visited Menvielle with another local farmer.

Menvielle said the Imperial County Farm Bureau stands behind IID on the issue.

Imperial-area farmer Larry Gilbert, considered by some to be a local farming leader, also is not a member of the Imperial Group.

"I do not support what they're trying to do," he said this morning.

Board members said Thursday IID holds the rights in trust.

Division 2 Director Bruce Kuhn said the challenge over how the water rights are held is not new.

"It needs to be put to bed," he said. "Either the IID owns these rights, ironclad, or we don't. ... I believe the IID owns them."

Kuhn said a court of law will have to lay the issue to rest.

Division 5 Director Rudy Maldonado said the issue has already gone to the U.S. Supreme Court.

"If they find weakness in it, have at it," he said.

>> Staff Writer Rudy Yniguez can be reached at 337-3440.

THE IMPERIAL GROUP
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Via fax and mail
December 30, 2002

Hon. Bennett Raley
Assistant Secretary – Water
1849 C Street NW
Washington, DC 20240

Hon. Board of Directors
Imperial Irrigation District
1284 Main Street
El Centro, CA 92243

Re: December 27, 2002 letter of Hon. Bennett Raley to Jesse Silva

Dear Hon. Bennett Raley and Hon. Directors:

As you are aware, the Imperial Group consists of substantial landowners / beneficiaries of the water rights that the Imperial Irrigation District (IID) holds in trust. We have reviewed the above letter and are relieved with the Department of Interior's (DOI's) statement of what they will do should the QSA not be executed by the end of this calendar year. We are not, however, taking any position as to whether the DOI's interpretation of the Law of the River and California law is correct, but are accepting it at face value for purposes of this letter.

While some voices have insistently declared that DOI would literally turn off the taps to the Colorado River and thereby decimate Imperial County, we can see that the truth is quite different. The subject letter plainly refutes any notion that DOI will act punitively or arbitrarily towards IID and its landowners / beneficiaries, much less the economy and citizens of Imperial County. The simple truth is in the numbers; the numbers of the two projections on pages 3 and 6 of the letter. 2,858,900 v. 3,070,400 AF (a delta of 211,500 AF). The bottom line is that if the QSA is not signed, IID stands to lose approximately 6.8 % of its water entitlements. The predictions of drastic reductions have proved false.

Bear in mind that the scenarios projected by DOI do not take into account the water priority to be transferred to CVWD under the QSA, nor do they take into account the water that must be let flow to the Salton Sea under the SWRCB order if the QSA is signed. On the contrary, we must assume that by omitting the Salton Sea flows, DOI is overruling the SWRCB order about Salton Sea makeup water and decreeing as Master of the River that no water may purposely flow to the Sea out of IID's allocation. Nor does

the DOI letter define "consumptive use" and why it is used in one chart but not in the other. These points (Salton Sea flows and "consumptive use") must be resolved immediately so that IID, DOI, and the landowners / beneficiaries can compare apples to apples. With those unresolved points, we are far from certain if the actual reduction of water to the water users in the IID will amount to the claimed 6.8 %.

Given the host of uncertainties farmers in the Imperial Valley face on a continuing basis -- the market, weather, interest rates, labor – a reduction of some 6 % of water is unremarkable. Farmers have routinely ridden through much harder times. That level of improvement can be accomplished in the same way other efficiencies have been accomplished – by the farmers and landowners themselves, with the support and unflinching cooperation of IID. The economy and jobs of the region may be affected, but not in any drastic fashion. The predictions of an apocalypse in IID if the QSA is not signed are no longer credible.

Just as importantly, DOI is putting in stark terms the "advantages" IID will receive if it bows to pressure and signs the QSA. That benefit is (perhaps) a six or so percent greater water entitlement. Weighed against that "advantage," are the unspecified risks the proposed transfer brings, including uncapped liabilities and extensive fallowing. To risk uncapped liabilities and extensive fallowing for nominally greater flows is, in a word, irresponsible. Moreover, the IID is not obligated to sign the QSA. The SWRCB order explicitly denies that it is binding on the IID unless the IID chooses to go forward with the transfer. No prudent trustee would ever accept such great risks for so little advantage.

The letter does not state, of course, the effect on the other water users if the QSA is not signed. Presumably other water entitles will need to make changes consistent with their junior right to the Colorado River water, e.g., fallow golf courses in the CVWD or modify new construction landscaping on the Coast. But those actions are no more than what the Supreme Court decrees require for junior rights holders. While the effect may be harsh outside of the IID, the IID would serve its beneficiaries best by taking advantage of its stronger position and biding its time and structuring a truly advantageous transfer.

If nothing else, the DOI letter is a timely reminder that the landowners / beneficiaries must continue to protect their water rights. Indeed, had the landowners not historically protected their rights so adamantly and received the favorable outcome in the Yellen lawsuit, the IID would be faced with much greater reductions given how the PPR's would have been calculated.

Our clients do not wish to create any impression that they oppose the transfer of water. On the other hand, they are not withdrawing their December 6, 2002 letter terminating the IID's trustee authority over the water rights. Any transfer must, however, be equitable and treat all landowners fairly and be advantageous (or at least neutral) for all citizens of Imperial County. A copy of the letter we have sent to landowners stating our basic position is enclosed. We have individually and collectively tried to cooperate with the IID and all parties but IID has declined to follow up. In that vein, we reiterate our request for information in IID's possession (detailed in numerous letters since September

2002) that will allow the creation of a landowner- and user-controlled water bank so that appropriate reductions and efficiencies may be achieved. If the IID cooperates and supports its beneficiaries, all of the citizens of Imperial County may benefit.

According to the DOI letter, there is a 30-day window of opportunity before DOI can take action (top of page 7). The Imperial Group stands ready to work with the DOI and IID to resolve all issues during this time and has ready to meet at any time a Negotiating Committee consisting of Heidi Kuhn, John Vessey, Mike Strahm, Mike Morgan, Lawrence Cox, and Alex Jack.

Again, in order to be able to rationally compare the execution of the QSA with not executing it, the IID and its landowners / beneficiaries will need DOI to address the above unknowns immediately (Salton Sea and the definition and application of "consumptive use").

Sincerely,

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El Centro CA

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Brawley, CA

Ann Kelley Elmore Ranches
Brawley, CA

John Elmore
Brawley, CA

Marie F. Emanuelli
Brawley, CA

Walter J and Toni F Holtz
Imperial, CA

John, Stephen, and Heddy Jordan and Joy Kramer, Brawley, CA

MW Morgan, ME Harthill, and J Mason, Brawley, CA

Mark and Marcia Osterkamp
Brawley, CA

James and Heidi Kuhn
El Centro, CA

Basin Partners
Santa Maria, CA

Steven G. Dahm
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Howard Elmore and Richard Elmore, Brawley, CA

Don and Mary Emanuelli
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Foster Family Partners
Yorba Linda, CA

Jack Bros. and McBurney Inc
Brawley, CA

BB Meyer, JR Benson,
Brawley, CA

John R. Norton
Phoenix, AZ

PVC Farms
Brawley, CA

(partial list)

Robert and Carol Ann Wilson
Brawley, CA

Ernest, Clifford, Michael, and Rodney Strahm, Holtville, CA

Vessey & Company, Inc.
El Centro, CA

John and Patricia Veysey
Brawley, CA

Rudy and Renita Schaffner
Holtville, CA

Roy and Marion Schaffner
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Scaroni Properties, Inc.
Heber, CA

Jack and Janet Rutherford
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JC, SL Rutherford, et al.
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Encl. Letter to landowners

c.
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THOMAS S. VIRSIK

Via fax and mail
January 8, 2003

Hon. Bennett Raley
Assistant Secretary – Water
1849 C Street NW
Washington, DC 20240

Re: 2003 Water Order Approvals

Dear Mr. Raley:

On behalf of our landowner clients in the Imperial Valley who have revoked the trust responsibility of the IID over the water rights appurtenant to their lands, please be advised that the December 27, 2002 water order approvals are not supported by the facts or law.

First, DOI did not provide notice to this office or my clients notwithstanding your receipt of the December 6, 2002 letter revoking the trustee function of the IID on our clients' behalf.

Second, the proposed order is inconsistent with the Seven Party Agreement (1931) that is by its terms incorporated into every water delivery contract of the DOI for Colorado River water in California. That Agreement controls how the DOI's Colorado River water is allocated among the California users when there is 4.4 MAF or more for California. DOI is purporting to allocate 4.4 MAF to California entities, so the Agreement expressly controls. The proposed delivery amounts are unauthorized under that Agreement in at least two ways.

The third priority right of the IID lands is shared by the CVWD lands under the Agreement. The DOI order reduces the IID delivery but not the CVWD's. The 12/27/02 letter to IID provides no explanation for that inconsistency. The contemporaneous letter to the CVWD acknowledges that CVWD has no PPR's upon which it may rely, and then inconsistently allocates to CVWD essentially its full request.

More importantly, DOI is ordering that the IID take less water so that the delta benefits a lower priority user. DOI has no authority to order a third priority user to take less so that a fourth priority user receives more. DOI is taking approximately

200K of IID's contractual entitlement to Colorado River water under the Agreement and ordering that it be delivered to MWD, all without compensation to the beneficiaries of those rights.

The DOI is claiming that it is relying on the decrees of the Supreme Court in reaching its water allocation results. Arizona v. California and its progeny. The primary decree, however, explicitly disavows that it may be used when determining water allocation within any (Colorado River) state, in direct contradiction to DOI's present position. "This decree shall not affect the relative rights inter sese of water users within any one of the States, except as specifically provided herein." Arizona v. California (1963) 376 US 340, Art. VIII. The supplemental decree in 1979 itself was limited to supplementing Art. VI by prioritizing and quantifying the PPR's; it did not purport to modify Art. VIII or the manner in which 4.4 MAF would be allocated to California (or allocations within any other state).

Neither IID nor any of its lands are presently subject to any findings of unreasonable use of water. In fact, the amount of water IID requested is within the presumptively reasonable 3.85 MAF total for the first three priority users under the Agreement. DOI has arbitrarily and without due process concluded that IID's third priority right (alone among all California users) is subject to an overriding "water duty" when allocating the contractual 4.4 MAF California entitlement controlled by the Agreement.

Apart from the justification for DOI's administrative transfer of IID water to the MWD, our clients remain interested in creating a water user controlled water banking system. The California Irrigation District Act expressly provides for such intradistrict transfers. Our clients would welcome DOI's technical assistance.

If you have any questions or desire to discuss ways in which to resolve the above, please feel free to contact me.

Sincerely,

Patrick J. Maloney

c. Messrs. Carter, Osias and Swan (IID)

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THOMAS S. VIRSIK

Via fax and mail
January 8, 2003

John P. Carter
Horton, Knox, Carter & Foote
Law Building, 895 Broadway
El Centro, CA 92243

Re: December 30, 2002 letter

Dear Mr. Carter:

We have been made aware of rumors distorting the tenor of our clients' December 30, 3002 letter to the IID Board and to the Department of the Interior (DOI). While it is impossible to quell all rumors – much less to predict how they mutate – please note at least this one simple clarification.

Our clients do not support DOI's reduction of flows to the Imperial Valley. The letter explicitly states at its head (last sentence of the first paragraph) that our clients are treating the DOI letter (or water order, in the DOI lingo) as facially valid for purposes of their comments, but in no way are supporting the reductions. The more elaborate term would be *arguendo*. In fact, our clients agree with your public pronouncements that the water order is an incorrect interpretation of the underlying facts, agreements, and law. See enclosed letter to DOI.

Our clients continue to believe that a united front is preferable to fractionalization, be it in front of DOI or any of the other transfer parties. In that vein, we reassert our standing invitation to you and/or your clients to discuss our legal positions, perceived disputes, and how our respective clients may be able to assist each other, much as occurred in the Yellen case. Cooperation would be in the best interest not only for our clients

(beneficiaries) and your clients (the current trustee), but the entire community.

On a related note, we understand that various of IID's cousnel have met with persons who are known to be represented by this office (e.g., their names appear on the Imperial Group missives) without advising this office of those contacts. Professional ethical obligations aside, common courtesy suggests that if your client has a criticism of a position this office has publicly advocated, it should direct that criticism to this office and by that conventional route resolve rather than increase our clients' differences. While we take no personal offense to those tactics, such backstabbing pettiness may undermine those important and legitimate areas in which our respective clients are in accord, e.g., that the DOI has no justification for administratively transferring IID water to MWD.

Sincerely,

PATRICK J. MALONEY

Encl. DOI letter

c. David Osias
William Swan

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THOMAS S. VIRSIK

Via fax and mail
January 31, 2003

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San Diego, CA 92101
619.233.1158

US Attorney's Office, SD CA
880 Front Street, Suite 6253
San Diego, CA 92101
619.557.5749

Re: IID v. Norton, SD Ca. No. 03 CV 0069

Dear Counsel:

We represent the owners of approximately 100,000 acres of land in the Imperial Irrigation District (IID) service area. As you may be aware, in early December 2002 our clients revoked under California law IID's trust responsibility over the water rights appurtenant to their land. IID has left out that material fact in its pleadings, however. Nevertheless, given that IID has initiated suit in the District Court purporting to act in its trustee capacity, we are contacting all present parties consistent with our collective professional obligations under Federal Rule of Civil Procedure 11 and Local Rule

83.4(a)(1). The purpose of this letter is to engage in a good faith dialogue on how our clients' (the beneficiaries of the water rights IID holds in trust) interests can be protected in the lawsuit, be it by formal appearances and stipulated agreements or otherwise.

Given the legal controversy as defined in IID's pleadings, our clients are as a legal and practical matter entitled to have their say in how it is to be resolved. Procedurally, our clients have standing to participate in the resolution of this controversy for all of the reasons set forth in the Yellen case's treatment of standing and intervention in markedly similar circumstances. Bryant v. Yellen, (1980) 447 US 352, see also Rules 19 and 24.

IID Is Not and Cannot Represent Beneficiaries of the Water Rights

Our clients have revoked IID's authority to act as their trustee for their water rights. While IID has publicly decried the revocation, it has to date declined to respond to our written attempts to ascertain what authority it is relying upon (California and/or common law) to ignore its beneficiaries' dictates. Allen v. Hussey (1951) 101 Cal.App.2d 457 (California irrigation district is subject to common and statutory trust law). Irrespective of the resolution of California law on that issue, no one can deny that IID and a substantial portion of its beneficiaries do not share the same interests at this time, as explained below.

For example, while IID is solely concerned with the delivery of water, the beneficiaries are also concerned about the economic result of the delivery or withholding of water. In other words, the beneficiaries may have a right to seek economic redress on their own behalf, which is something that is simply not part of IID's outlook. Hence, when crafting any injunctions, relief, or even phrasing argument, IID need not and will not keep in mind its beneficiaries' potential economic relief. IID does not represent any of its beneficiaries in that respect. Certainly, the action as presently pleaded is not requesting financial relief, but that is a concern of the beneficiaries whether or not IID has or can address it.

Recent Motion for Injunction Shows Division Between IID and Beneficiaries

The recent motion and its attendant declarations amplify the problem of IID representing the true and legally cognizable stakeholders. The declaration of

its general manager, Mr. Jesse Silva, is particularly problematic for two reasons. First, Mr. Silva repeatedly uses the word "farmers" when such term has no legal meaning in this proceeding. Second, he makes declarations about certain core historical documents when IID has failed to comply with its obligations under California law (the Public Records Act and the Probate Code – trust law) to provide to its beneficiaries the very documents upon which he must be relying. The declarations of the three "farmers" (only one of whom declares himself a beneficiary to whom IID owes any duty) also reflect that IID is taking the most extreme view possible instead of looking out for its beneficiaries as a whole.

The liberal use of "farmer" in describing the alleged factual situation in the Imperial Valley by its general manager reflects that IID either does not understand its trust responsibility or is refusing to acknowledge it for its own political reasons. The use of the term "farmer" is not synonymous with beneficiary. The proper term in the present context is landowner. The Courts (District, Ninth Circuit, and the Supreme) were all very careful to keep those concepts separate in the last round of federal litigation about IID's water rights, the Yellen line of cases. In fact, part of the controversy in that case was about the standing of "farmers" who wanted to intervene on the basis that they desired to become "landowners." The distinction is crucial because as both California law and the Supreme Court state, the water rights IID holds in trust are appurtenant to the land; the beneficiaries of the trust are landowners and only landowners. Farmers (i.e., non-landowners) are simply not beneficiaries of the trust that IID administers. IID admits as much when it is in its political interest to do so.

> As a result of Interior's recent actions, IID has been compelled to file suit in federal court to preserve, protect, and enforce its water rights, which it holds in trust for the landowners of the Imperial Valley who irrigate nearly 500,000 acres of some of the most productive farmland in the world.

Testimony of Jon P. Carter, January 14, 2003 before the (California) Assembly Water, Parks and Wildlife Committee.

This is not to say that farmers and the farming community are not important. Farmers are an integral part of the regional agricultural economy, just like field hands, tractor technicians, and fertilizer salespeople. But they are not

beneficiaries and have no rights under any of the underlying contracts or agreements. Only one of the three "farmer" declarations IID has submitted affirmatively recites that the declarant is a landowner; the other two are interested parties at best under their averments. Our clients, on the other hand, are a substantial portion of the real beneficiaries and have third party rights under all of the agreements IID executed in its role as their trustee. That IID does not emphasize to the Court who its beneficiaries are and are not is reason in itself for our clients to play a role.

Secondly, Mr. Silva makes various representations about how IID acquired the water rights (assuming for the moment their veracity), relying on apparent historical documentation. See ¶ 19 of his declaration. Our clients demanded of the IID under the California Public Records Act those documents in September 2002. After substantial delay, IID claimed that it did not have possession of the documents and could not provide them for that reason but would follow up to be certain. Apparently IID does have such documents in its possession, for if it did not Mr. Silva could not have declared as he did. Again, IID is not acting on its beneficiaries' behalf (and is violating California law) by refusing to support its beneficiaries, necessitating that the beneficiaries have a direct role in the litigation.

Our clients also take issue with portions of the declarations of the one beneficiary (Mr. Elmore) and the two strangers to the trust obligations (Messrs. Menvielle and Gilbert). The clearest example of a conflict in facts between the norm and what is a unique position is the declaration of Larry Gilbert. Mr. Gilbert is apparently a farmer of sugar cane, a notoriously thirsty crop. He claims that "farmers hope to establish" a sugar cane industry in the Imperial Valley. But Mr. Gilbert is neither speaking for anyone other than himself nor is he even speaking as someone to whom IID owes any duty under its trust obligations. The planting of such a high water use crop could push the aggregate use of water even higher, unless Mr. Gilbert and other sugar cane farmers reduce their other plantings so that their overall water use remains stable. After all, the unremarkable law in California is that water rights are correlative within priorities and by extension correlative within an irrigation district (which Yellen recognizes, see n. 23), meaning that if Mr. Gilbert's neighbors have need of water he is obligated to modify his practices and/or his crops. The issue is not whether a tropical crop like sugar cane should be planted in an arid desert (in a free market people are allowed to take risks), but whether IID is representing its

real beneficiaries by proffering as typical such extreme water uses and water users. The more typical and representative beneficiaries need to be involved.

Suggested Course of Action

Fundamentally, our suggestion is that the parties stipulate to the appearance of our clients so that they will have a direct role in crafting any injunction, other relief, and/or compromises. In the alternative, our clients need not make any formal appearance if appropriate accommodations can be made to insure that they will have a role parallel to IID. We are available to meet Thursday or Friday of next week. While our clients have strong views about the underlying rights and obligations that comprise the IID's pleadings, they also have an interest in reaching an accord that provides to them security and opportunity, which IID as a political entity may or may not share.

If we cannot reach an amicable agreement by February 7, 2003 about protecting the beneficiaries apart from whatever positions IID takes, our clients will pursue their remedies independently. We are sending a copy of this letter to the federal parties since according to the District Court website, no AUSA has yet appeared.

Sincerely,

PATRICK J. MALONEY

c. Gale Norton
Bennett Raley
Robert Johnson

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THOMAS S. VIRSIK

Via fax
February 4, 2003

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Michael Gheleta — Fax 303.312.7379
Trial Attorney, US Department of Justice
Environment & Natural resources Division
Suite 945, North Tower
998 18th street
Denver, CO 80202

Re: IID v. Norton, SD Ca. No. 03 CV 0069

Dear Messrs. Macfarlane and Gheleta:

We represent the owners of approximately 100,000 acres of land in the Imperial Irrigation District (IID) service area. Enclosed please find a January 31, 2003 letter we transmitted to the listed recipients. We were then unaware of who within the Department of Justice had been assigned this matter, so we sent our letter to the local US Attorneys office. We learned of your identities through the filings of MWD and CVWD that we obtained this week.

Sincerely,

PATRICK J. MALONEY

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Via fax
February 6, 2003

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Linus Masouredis
Deputy General Counsel, MWD
700 North Alameda Street
Loa Angeles, CA 90012
Fax 213.217.6890

Re: IID v. Norton, SD Ca. No. 03 CV 0069

Dear Messrs. Masouredis and Abbott:

We represent the owners of approximately 100,000 acres of land in the Imperial Irrigation District (IID) service area. Enclosed please find a January 31, 2003 letter we transmitted to the listed recipients. We have since transmitted it to the AUSA's assigned and now are transmitting it to you based on your pleadings filed last week.

Sincerely,

PATRICK J. MALONEY

c. Messrs. Osias and Carter (IID)

U.S. Department of Justice

Environment and Natural Resources Division

90-1-2-10832/1
KJH:SMM

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February 10, 2003

Via U.S. Mail

Patrick J. Maloney, Esq.
2425 Webb Avenue, Suite 100
Alameda Island, California 94501-2922

Re: Imperial Irrigation Dist. v. United States, et al., Case NO. 03-CV-0069W (JFS) (S.D. Cal.)

Dear Mr. Maloney:

I write in response to your letter of February 4, 2003, on behalf of your clients, landowners within Imperial Irrigation District, addressed to my colleague Michael Gheleta and myself, which attaches your letter of January 31, 2003, addressed to counsel for the Plaintiff in the above-referenced lawsuit and to the United States Attorney's Office. Your January 31 letter requests that the parties stipulate to the participation of your clients in this lawsuit "so that they will have a direct role in crafting any injunction, other relief, and/or compromises."

The United States respectfully declines to stipulate to your clients' participation in this litigation, as you request. We do so for two principal reasons. First, we do not believe that any injunctive or other relief is justified or appropriate in this lawsuit. Second, we apprehend that your disagreements lie with the Plaintiff, rather than with the United States, based upon your assertion that your clients have "revoked IID's authority to act as their trustee for their water rights." Accordingly, we reject the offer to stipulate to your participation in this case or to arrive at some other informal "accommodation" that accords your clients a role parallel to IID.

Your clients may, of course, elect to pursue their participation in this litigation through the avenue afforded under Rule 24 of the Federal Rules of Civil Procedure. The United States reserves its right, however, to raise any objections it deems appropriate to a motion to intervene.

Sincerely,

Stephen M. Macfarlane
Trial Attorney
United States Department of Justice

cc:
John P. Carter, Esq.
David L. Osias, Esq.
Linus Masouredis, Esq.
Steven Abbott, Esq.
Tom Stahl

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THOMAS S. VIRSIK

Via fax and mail
February 17, 2003

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Linus Masouredis 213.217.6890
Deputy General Counsel, MWD
700 North Alameda Street
Loa Angeles, CA 90012

Re: IID v. Norton, SD Ca. No. 03 CV 0069

Dear Counsel:

We are in receipt of Mr. Macfarlane's February 10, 2003 letter on behalf of the federal defendants and appreciate the United States' litigation position. We have, however, not received any other responses to our January 31, 2003 letter (sent somewhat later to the putative intervenors).

Please note that well before the water order that underlies this action, the real parties in interest (landowners) actively sought to work with the federal defendants and asked assistance of them so that IID's water order would not be reduced; having little faith that the IID would protect their interests. Our clients submitted a methodology for improving the water efficiency in IID. The federal defendants ignored those entreaties. The administrative record, once prepared, will reflect the letters copied to the federal defendants, communications directed specifically to them, and their responses (oral, written, and by telephone). All of those contacts will establish that the federal defendants had realistic options that they chose to ignore in favor of issuing the subject water order and taking water from the real parties.

Notwithstanding the other parties' lack of response to our January 31, 2003 letter, we remain hopeful that beneficial long-term solutions may be found to the water issues faced most directly by our clients and other IID beneficiary class members (the real parties in interest under Rule 17), within or without the present litigation. In that vein, we have enclosed with this letter a proposal by which the underlying water issues (including those seemingly raised by MWD and CVWD) could be resolved, including a method by which the water use in IID's service area may be better managed for all parties' benefit.

We understand that the Court has continued the hearing date for the requested preliminary injunction to March 10, 2003, allowing a modicum of breathing space. We will, nevertheless, pursue our clients' remedies in the interim, including our clients' view that to the extent that the water use in the IID service area is "excessive" (whether under its so-called "water duty" or under the California reasonable and beneficial standard), the fault is that of the trustee-plaintiff -- not the real parties in interest -- and the trustee-plaintiff must be held accountable to its beneficiaries.

We remain available to discuss the proposal or the matters set forth in the January 31, 2003 letter.

Sincerely,

PATRICK J. MALONEY

Imperial Irrigation District

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For more information, contact the Public Information Department at (760) 482-9600.

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IID Board Identifies Possible Impacts of Water Cutback 2003-02-18

FOR IMMEDIATE RELEASE: Feb. 18, 2003
CONTACT: Ron Hull, (760) 482-9601

"If we don't get a favorable ruling on our preliminary injunction motion by March 10th 2003, it will be necessary for the Imperial Irrigation District to reduce farm deliveries by approximately 15 percent for 2003," stated IID Board member Bruce Kuhn in a motion at today's Board meeting.

The motion was seconded by Board member Stella Mendoza and was followed by a unanimous affirmative vote.

"While we have not yet developed the specific emergency program, and hope we will not have to institute it, we realize any cut-back program would have a devastating economic impact on the farm community and the Imperial Valley as a whole," Kuhn said.

"Although there has been much debate on the methods to accomplish any cutback, the IID Board is not ready to announce the components of any emergency plan," said IID General Manager Jesse Silva. "The Board members have all expressed concern about the delay, but are just as concerned about protecting the Valley's water rights."

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THOMAS S. VIRSIK

Via fax and mail
February 19, 2003

Lloyd Allen
Andy Horne
Stella Mendoza
Bruce Kuhn
Rudy Maldonado
Imperial Irrigation District
1284 Main Street
El Centro, CA 92243

Re: IID v. Norton, SD Ca. No. 03 CV 0069

Dear President and Directors:

We never received any response from IID to our letter of January 31, 2003 attempting to reach some accommodation among our clients and IID in the above federal lawsuit. Our clients would like nothing better than to march lockstep with IID in the federal lawsuit. That combination was potent in Yellen and would materially improve IID's chances of prevailing against DOI. We all would benefit from such cooperation and coordination. Thus far, however, IID has not expressed one iota of interest in coordinating with the farming and landowner interests.

Instead, IID has struck out on its own. For example, it proffered the declarations of several of its favorites in support of the injunction who, frankly, may be compromised far too readily. Our client base would be invaluable in providing assistance in holding off DOI and moving this Valley towards a productive and proactive water management solution – one

in which the QSA and transfer are a distinct reality. Yellen provides a model for such a successful partnership.

Thus far our clients have monitored the litigation closely but have refrained from making any formal appearances. Recent events, however, reflect that they may no longer be able to stay on the sidelines, e.g., MWD and CVWD's positions about reasonable and beneficial use. Ultimately, our clients or some of their representatives will need to take an active role in the lawsuit, be it with or against IID. The latter course of action would involve breach of trust and other cross-claims against IID so that should IID not prevail, our clients' interests could nevertheless be somewhat protected. That course of action, while entirely justified considering the content and tenor of the federal litigation as pleaded, could be a PR nightmare for both IID and our clients and could erode whatever political support IID has managed to garner in recent days.

We are asking simply and directly if IID is willing to negotiate in good faith a coordinated position between it and its beneficiaries in the federal lawsuit. The stakes are too important to put petty or personal politics and ego (whether the lawyers' or others') ahead of the overall interests of the Imperial Valley and its strong land-based water rights. In that vein, the letter of February 17, 2003 and its 9-point proposal is a token of our clients' sincere interest in finding a workable solution for all parties. Our clients are also trying to implement a water clearinghouse that may serve to reduce IID's overall water use, but have not been able to finalize their proposal since IID has failed to cooperate or provide the underlying water data requested since September 2002.

If we do not have an affirmative response by the close of business on Wednesday, February 26, 2003, we will conclude that our clients have no means to protect their interests other than to do so directly and possibly to IID's detriment. We hope IID does not force that public controversy.

Sincerely,

PATRICK J. MALONEY

c.

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MWD
METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Office of the Board of Directors

February 24, 2003

Thomas M. Hannigan, Director
Department of Water Resources
State of California
1416 9th Street
Sacramento, CA 95814

Dear Director Hannigan:

We, the Board Negotiating Committee for The Metropolitan Water District of Southern California, consisting of representatives from member agencies throughout our service area, are writing to clarify Metropolitan's position on the Quantification Settlement Agreement (QSA) negotiations.

As our staff has made clear in recent negotiations, we have been working over seven years to secure, for the benefit of our 18 million residents and ratepayers, the application and implementation of the Interim Surplus Guidelines (ISG), the quantification of water use by the California agricultural agencies and the commencement of agricultural-urban water transfers on reasonable terms. At this point, we have secured none of those goals. Instead, the Imperial Irrigation District (IID) demands ever-increasing amounts of remuneration for its participation in the QSA, while reducing the chances for reinstating the ISG by filing broad legal actions against the federal government. Meanwhile the potential benefits of the ISG continue to shrink due to drought conditions on the Colorado River. In short, we are faced with the very real question of whether to proceed with the QSA as restructured since October, and whether it continues to be in the public interest.

From a public policy perspective, the QSA has always been a close call. Throughout the QSA process, there has been delicate balancing of the rights and interests among the parties to the QSA (Metropolitan, IID and the Coachella Valley Water District (CVWD), the San Diego County Water Authority (SDCWA), the State and the United States). IID has always wanted more financial rewards from this transfer over and above the costs of conservation and any required mitigation for the transfer. SDCWA wants to assure that, while paying enough to satisfy IID, it would get preferential treatment for moving the transfer water within Metropolitan's system. CVWD wishes to be compensated for not diverting the water IID would conserve (which CVWD sees as being conserved from waste). Metropolitan has tried to assure that its costs do not exceed its benefits. While the QSA no longer has anything to do with market transfers and is likely to set an unsustainable precedent for such transfers in the future, and so

long as this balance was maintained, it appeared that all involved were better off with the QSA than without.

Unfortunately, this balance has changed substantially since we last had an agreement on a proposed QSA in October. Since that agreement, IID has demanded another $350 million in financial benefits, which SDCWA and IID wish the State to cover, and has proceeded with litigation on all of the major legal issues governing the use of Colorado River water. SDCWA seeks another multi-million dollar discount from Metropolitan's standard uniform transportation rate – in essence a subsidy from its fellow Metropolitan member agencies. CVWD's benefits have been cut, and the probability of surplus water for Metropolitan's customers has been substantially reduced. As a result, the costs to our ratepayers, and to the taxpayers (more than half of whom are those same ratepayers), now greatly exceed the benefits. Furthermore, the likelihood that the U.S. Department of Interior (DOI) will approve the QSA and promptly reinstate the ISG is, at best, unknown. A QSA may still be acceptable but if and only if, we can promptly eliminate the uncertainty in the current structure while ensuring that the costs of the program equal the benefits to the public.

Our view is that the QSA package currently being advanced by IID and SDCWA does not sufficiently meet the minimum goal of providing assurance that the ISG will be promptly reinstated on reasonable terms. Instead, that package seems to promise more delay without results. That package is highly dependent on subsequent events outside of the control of the parties, and we have no real assurance that these events will occur or any real understanding of how they could occur.

As a consequence, Metropolitan has been forced to make, and will continue to make, significant investments in alternative supplies to avert a water crisis. Metropolitan alone made the investments in storage and substitute programs which prevented the suspension of the ISG from turning into an actual crisis. Now we are being asked to provide further subsidies to an uncertain program while simultaneously funding the substitute programs to provide real water reliability. This situation is untenable, and we need to determine now if we can provide certainty to the QSA or if the time has come to pursue alternative paths.

The following points highlight some of the key issues that remain problematic in this process. We propose suggested solutions that Metropolitan believes would serve the public interest and lead to a true closure on the QSA. If we cannot reach agreement on these solutions promptly, then we will move forward with or without an alternative QSA.

1. ~~Use of Proposition 50 Funds – The use of funds from Proposition 50 to pay for inflated~~ basic mitigation costs related to the SDCWA/IID transfer and for IID's ongoing operational environmental impacts is a "tough sell" to the environmental community and to our member agencies who would like a fair opportunity to compete for these funds. Adding to that burden is the concept that $50 million of the Prop. 50 proceeds will go to

IID as compensation for "salinity control," i.e., for water already flowing into the Salton Sea. Finally, it is proposed that the mitigation funds be held in a tax-free interest bearing account until needed - - a proposal that no one, after weeks of study, can assure us is legally permissible. In the event that any portion of these funds is not made available for use in this unprecedented fashion, IID's position is that it can terminate the QSA. Given the unpredictability of the legislative process, the increasing number of questions that are being raised about the feasibility and propriety of this approach, this would almost certainly give IID unilateral power to make new demands in subsequent QSA negotiations and thereby increase the likelihood that DOI would not reinstate the ISG.

Proposed Solution – At a minimum, the $50 million being proposed for "salinity control" purposes (the payments to IID for water that would likely flow to the Sea anyway) should be redirected for use on Salton Sea restoration as originally anticipated by the environmental community during the SB 482 (Kuehl) negotiations. IID should agree that it would not terminate the QSA if portions of these funds were eventually redirected by the Legislature as suggested in the recent letter from Senators Burton, Kuehl and Machado. Finally, before any decision on the appropriate amount of Proposition 50 funds to be used for program mitigation costs, the Department of Fish and Game should independently review the IID mitigation proposal and determine the real costs necessary to reasonably satisfy the mitigation burden of the transfer. Mitigation costs for IID's own operations should not be included.

2. <u>IID Water Delivery to SDCWA</u> – Given that we are now over five years into the evolution of this proposed transfer, IID should have disclosed long ago a definitive proposal on how the water would be conserved, how farmers would be compensated, what system improvements would be built, etc. Instead, we have been continually told that this deal must be closed before IID will develop or reveal its program and start to seek farmer subscriptions. This is contrary to how Metropolitan's program with Palo Verde Irrigation District has been constructed which causes us concern that IID has no credible conservation program, and that we are facing further delay that will end in yet another recitation of why IID cannot yet define its multi-billion dollar program.

Proposed Solution – IID should guarantee that it would make water available for transfer regardless of its conservation methodology so that its farmer subscription program will not become a roadblock or potential off-ramp.

3. <u>IID Litigation</u> – CVWD and Metropolitan have been forced to pursue both the current QSA negotiations and IID's litigation simultaneously. The pending litigation has made it difficult to discern whether IID is pursuing its options in the QSA negotiations as a means to reach closure or merely as a means to further its litigation strategy. Given IID's positions in the litigation, the outcome of the litigation may be far more important to our ratepayers than the QSA. IID has asserted that the amount of conserved water under the

1988 IID/MWD Conservation Program should not be subtracted from IID's water use allocation, which would nullify any benefit of the program to Metropolitan. This new IID position is of great concern to our Board, as it would in effect wipe out the value of Metropolitan's $175 million plus investment in IID's water conservation to date.

Proposed Solution – IID should withdraw all of its motions pending completion of QSA negotiations. If negotiations on the QSA are successfully concluded, IID should be required to dismiss its lawsuit with prejudice as the only condition precedent to QSA closing. Otherwise, we cannot agree to the QSA, and we believe that there is no chance that DOI will reinstate the ISG absent the dismissal as outlined above.

4. **SDCWA's Transportation Rate** – Another uncertainty posed by the current proposal is the "open" transportation price for moving the transfer water within Metropolitan's system for years 31-45 of the IID/SDCWA transfer. For several reasons, Metropolitan is unwilling to accept this uncertainty. Metropolitan has expended considerable effort in developing an unbundled rate structure that applies uniformly to all Metropolitan member agencies and other users of Metropolitan's system. The purpose of this effort was to make Metropolitan's costs more transparent and to facilitate a developing water market in California. This three-year collaborative process was just recently completed, and this is the first year the new rate structure has gone into effect. The genesis behind this effort was SDCWA and IID joining forces with private water marketing firms to challenge Metropolitan's rate structure in both Sacramento and in the courts. The net result of that fight was a finding by a California Court of Appeal that Metropolitan's Board may recover its systemwide costs when setting transportation rates instead of the "point-to-point" methodology advocated by SDCWA. Having fought this fight and prevailed, and then having worked through a new rate structure to encourage transfers, Metropolitan's Board is simply not willing to abdicate its responsibility to set fair and uniform rates to an arbitrator. SDCWA has done nothing more than attempt to 'turn back the clock' to renew a dispute that was resolved in the late 1990's.

An agreement giving SDCWA priority to the exclusion of other member agencies in claiming conveyance space in Metropolitan's system while remaining "silent" on the price that SDCWA must pay for its priority use of that system would prejudice Metropolitan's ultimate legal and economic position for several reasons, including the following:

- The pricing issue would eventually be resolved under contract law principles, not the established law and legal rulings that protect Metropolitan's Board's ability to set rates.

MWD
METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Office of the General Counsel

February 26, 2003

Patrick J. Maloney
Law Offices of Patrick J. Maloney
2425 Webb Avenue, Suite 100
Alameda Island, CA 94501-2922

Re: *Imperial Irrigation District v. United States*
No. 03-CV-0069 W (JFS) (USDC S.D.Cal)

Dear Mr. Maloney:

This letter responds to your earlier letters of February 6, 2003 and February 17, 2003 regarding the above lawsuit. In reviewing your letters and the issues you cite, it appears that your clients' concerns are with Imperial Irrigation District ("IID") and not with Metropolitan Water District. We appreciate the concerns of your clients but we do not see that they can be addressed by Metropolitan.

If your clients believe that they have interests that may be adversely affected by the litigation that are not adequately represented by existing parties, the appropriate course of action would be to seek to intervene under Fed. R. Civ. Pro. 24. We will evaluate the issue of your intervention in the litigation if and when you file an appropriate motion or application for leave to intervene, and respond accordingly at that time.

Sincerely,

Linus Masouredis

Linus Masouredis
Deputy General Counsel

cc: Jeffrey Kightlinger, General Counsel
Stephen Macfarlane, USDOJ
Tom Stahl, USDOJ
John P. Carter
David L. Osias
Steven Abbott

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THOMAS S. VIRSIK

Via fax 805-965-4333 and mail
March 10, 2003

Mr. Scott Slater
Hatch & Parent
21 East Carrillo
Santa Barbara, CA 93101-2782

Re: IID v. USA, SD Ca. No. 03 CV 0069

Dear Mr. Slater:

We represent the owners of approximately 100,000 acres of land in the Imperial Irrigation District (IID) service area. We are writing to you in your capacity as counsel involved in the IID-SDCWA transfer for the San Diego County Water Authority (SDCWA). You have likely received our prior letters to IID with respect to its authority and restraints thereon. As you may be aware, IID has sued the Department of Interior over the December 27, 2002 water order that reduced IID's allocation of Colorado River water. As you also may be aware, Coachella Valley Water District (CVWD) and the Metropolitan Water District of Southern California (MWD) recently intervened as defendants, i.e., they are defending the Department of Interior against IID.

Our clients have had a variety of productive contacts with other counsel under Federal Rule of Civil Procedure 11 and Local Rule 83.4(a)(1) to determine if accommodation short of intervention could be reached with our clients in the above action. Having reached no such cooperative resolution, our clients will be moving to intervene in that lawsuit. The purpose of this letter is to provide notice to you consistent with our professional obligations

under the above standards of our clients' contemplated intervention, in that their position in the lawsuit may affect the negotiations and/or agreements among the SDCWA and IID over the transfer of water in the first instance, and the other putative parties to the QSA in the second. We are inquiring if SDCWA has interest in resolving issues that will impact the transfer and/or is contemplating intervening in the lawsuit to protect its own interests. Our clients and SDCWA may be able to mutually support each other's positions if that is so. If your client is so inclined, please let us know immediately.

Copies of this letter are being sent to existing counsel in the lawsuit in order to provide them with the same notice as a matter of professional courtesy.

Sincerely,

PATRICK J. MALONEY

c.

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Attorneys for applicants in intervention
WALTER HOLTZ, MICHAEL MORGAN,
and MICHAEL STRAHM

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IMPERIAL IRRIGATION DISTRICT. Plaintiff vs. UNITED STATES OF AMERICA, GALE NORTON, BENNETT RALEY, and ROBERT W. JOHNSON Defendants	Case No. 03CV0069 W (JFS) [PROPOSED] CROSS-COMPLAINT IN INTERVENTION FRCivP 13 JURY TRIAL DEMANDED
WALTER HOLTZ, MICHAEL MORGAN, and MICHAEL STRAHM Applicants in Intervention Vs. UNITED STATES OF AMERICA, GALE NORTON, BENNETT RALEY, ROBERT W. JOHNSON, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, and IMPERIAL IRRIGATION DISTRICT, Cross-defendants	

Applicants for intervention WALTER HOLTZ, MICHAEL MORGAN and MICHAEL STRAHM hereby complain against the United States of America, Gale Norton, Bennett Raley, Robert W. Johnson, Metropolitan Water District of Southern California (MWD), and the Imperial Irrigation District (IID) as follows:

JURISDICTION AND VENUE

1. The underlying action involves the United States and its agents. Subject matter jurisdiction and sovereign immunity waiver are proper under the laws of the United States, including 28 USC §§ 1346, 2201, and 2202; 5 USC §§ 551 et seq. and 701 et seq.

2. Supplemental jurisdiction of claims herein is authorized under the statutes of the United States. 28 USC § 1367.

3. Venue is presently vested in this Court per 28 USC § 1391 because the events arose in the Southern District of California, the res at issue, and cross-complainants and cross-defendants reside within the district.

PARTIES

4. WALTER HOLTZ, is a resident of Imperial County and has an ownership interest in land within the service area of IID, more specifically among others, parcel APN 0542502301. By virtue of said ownership of land, he is an express beneficiary of the water rights that IID holds in trust. Said parcel has an appurtenant right to receive water diverted from the Colorado River.

5. MICHAEL MORGAN is a resident of Imperial County and has an ownership interest in land within the service area of IID, more specifically among others, parcel APN 0191100601. By virtue of said ownership of land, he is an express beneficiary of the water rights that IID holds in trust. Said parcel has an appurtenant right to receive water diverted from the Colorado River.

6. MICHAEL STRAHM is a resident of Imperial County and has an ownership interest in land within the service area of IID, more specifically among others, parcel APN 0412301501. By virtue of said ownership of land, he is an express beneficiary of the wate rights that IID holds in trust. Said parcel has an appurtenant right to receive water diverted

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from the Colorado River.

7. Collectively WALTER HOLTZ, MICHAEL MORGAN, and MICHAEL STRAHM are referred to as INTERVENORS herein.

8. METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA (MWD) is a public corporation that delivers water to parts of Southern California, including San Diego County. By order of this Court, MWD was joined as a co-defendant in this action.

9. IMPERIAL IRRIGATION DISTRICT (IID) is an irrigation district formed by landowners - settlors under the Water Code of California (sections 20510, et seq). IID holds its assets in trust for the benefit of the landowners – settlors and in particular it is the trustee of the water rights appurtenant to the lands of LARRY, CURLY and MOE, among other landowners, under California law.

10. Gale Norton is the Secretary of the United States Department of the Interior. Bennett Raley is the Assistant Secretary for Water and Science. Robert W. Johnson is the Regional Director of the Bureau of Reclamation, an agency of the Department of the Interior. Collectively, they are referenced herein as the FEDERAL DEFENDANTS.

FACTUAL ALLEGATIONS

11. Under its water rights and contracts, IID has the right to receive from the FEDERAL DEFENDANTS Colorado River water up to a certain volume in certain priority relative to other California Colorado River water users, all of which water is to be delivered to and used for the benefit of INTERVENORS and other landowners within the IID service area.

12. IID holds senior water rights in trust for INTERVENORS and other landowners in the IID service area under federal and California law as a result of IID's and landowners' predecessors in interests' activities more than one century ago, which rights are memorialized in contracts with other California rights holders and the Department of the Interior, IID's organic authority, state water permits, and other writings.

13. Any beneficiary of the trust by which IID holds its water rights may challenge

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the construction of the trust or the acts of the trustee under California law, including INTERVENORS. Probate Code § 17200.

14. MWD is a party to several contracts and other writings, including the Seven Party Agreement and the 1988 Conservation Agreement, that specifies the amounts and priorities of water IID and MWD may receive from the FEDERAL DEFENDANTS' delivery of water from the Colorado River to water users in California.

15. The FEDERAL DEFENDANTS have made such agreements between MWD and IID a part of their contracts with the California water users for the delivery of Colorado River water.

16. Under such contracts and writings, IID's priority is higher than MWD, meaning that IID's rights must be satisfied first when the amount of water is constrained, i.e., in a normal or less than normal year.

17. At all times relevant herein, the FEDERAL DEFENDANTS and MWD were aware that IID was holding all water rights subject to all of the agreements germane herein in trust for the landowners in its service area, including INTERVENORS.

18. IID placed a lawful water order for approximately 3.1 MAF for the 2003 water year with the FEDERAL DEFENDANTS for the benefit of its landowners, including INTERVENORS.

19. The FEDERAL DEFENDANTS on or about December 27, 2002 determined that 2003 would be a "normal" water year and that consequently California would receive a combined total of 4.4 MAF from the Colorado River.

20. The FEDERAL DEFENDANTS issued a December 27, 2002 water order materially withholding water from the 3.1 MAF ordered.

21. The FEDERAL DEFENDANTS issued a December 27, 2002 water order to MWD that granted to it approximately the entire reduction of IID's allocation, resulting in a water order for MWD for water year 2003 that materially exceeded the amount to which it would be entitled under the Seven Party Agreement and other binding contracts and writings.

22. The FEDERAL DEFENDANTS' December 27, 2002 water order reducing the

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amount of water available to IID will harm INTERVENORS and other landowners in the IID service area.

23. The FEDERAL DEFENDANTS' December 27, 2002 water order reducing the amount of water available to IID grants to MWD water that MWD would not receive but for the FEDERAL DEFENDANTS' reduction of water to IID.

24. MWD has not paid or offered to pay to IID or to the landowners for whom IID holds water rights in trust – including INTERVENORS – the value of the water MWD has been granted by the FEDERAL DEFENDANTS from IID's allocation.

25. INTERVENORS are informed by IID and the FEDERAL DEFENDANTS and on that basis believe and allege that they and other landowners within the IID service area will receive less water in 2003.

26. The Colorado River water IID is obligated to make available to INTERVENORS and other landowners is used primarily for agriculture in the Imperial Valley.

27. IID's water rights to divert Colorado River water in trust for the benefit of INTERVENORS and other landowners are long-standing. Landowners in the Imperial Valley created IID in 1911 under then existing Irrigation District law.

28. No entity has made any findings that the water use, or any portion thereof, in the service area of IID is presently unreasonable or not beneficial.

29. The State Water Resources Control Board in a December 31, 2002 decision found that IID's collective water use was reasonable under California law.

30. The State Water Resources Control Board in a December 31, 2002 decision expressly found that IID was not mandated to proceed with any transfer of water or the execution of any quantification or other new agreements regarding the water rights it holds in trust.

31. IID in 2002 and before was involved in negotiations with the Federal Defendants, MWD, and other local, state, and other interests over the quantification and/or modification of the water rights appurtenant to the lands of INTERVENORS.

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32. IID has stated as a matter of federal pleading practice (e.g., FRCivP 11) that the negotiations with the FEDERAL DEFENDANTS, MWD, and other local, state, and other interests over the quantification and/or modification of the water rights appurtenant to the lands of INTERVENORS and other landowners including any temporary or permanent transfers thereof are not yet final. ¶¶ 73 and 74 of Complaint.

33. IID has admitted as a matter of federal pleading practice (e.g., FRCivP 11) that the water rights that are the subject of the underlying action brought by IID are held in trust for the benefit of the landowners. ¶ 50 of Complaint, n.3.

34. IID did not provide to INTERVENORS or other landowners timely and meaningful reports on the negotiations with the FEDERAL DEFENDANTS or others.

35. The effect of all negotiations with the FEDERAL DEFENDANTS over the water order directly affects the rights of INTERVENORS.

36. In December 2002 INTERVENORS and other landowners offered to provide assistance to IID so that IID could protect the interests of INTERVENORS and other landowners. IID ignored the offers.

37. In December 2002 INTERVENORS, among others, caused to be sent to IID a writing revoking IID's trust responsibility over the water rights appurtenant to INTERVENORS' lands. IID refused to honor its beneficiaries' demand, and refused to provide to its beneficiaries IID's authority for doing so.

38. IID and the San Diego County Water Authority (SDCWA) signed an agreement on or about December 31, 2002, thereby purporting to materially change the terms of the trust under which IID holds the water rights for the benefit of INTERVENORS and others should that agreement ever become final. That agreement purports to promise to SDCWA certain water in exchange for money.

39. IID neither obtained nor sought the approval of its beneficiaries or any court of competent jurisdiction in making those purported material changes to the terms of its trust.

40. INTERVENORS, among others, sought from IID support and/or approval of water clearing house as authorized under the California Irrigation District Act operated by

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landowners and farmers in order to improve efficiencies.

41. INTERVENORS and others, through counsel, sought of IID irrigation data designated public under California law in order to finalize a means for improving water uses and efficiency, but IID has refused to provide such data to its beneficiaries.

42. IID has failed to provide any support or assistance, and has publicly opposed the creation of a water clearing house for reasons other than the benefit to the landowner beneficiaries.

43. IID has a duty to act as a reasonably prudent person when administering the water rights it holds in trust for the exclusive benefit of landowners in its service area, including INTERVENORS.

1st CLAIM FOR RELIEF

(As to FEDERAL DEFENDANTS – Water rights)

44. Paragraphs 1 through 43 are incorporated herein as if set forth at length.

45. INTERVENORS' and others' water rights, held in trust by IID, require the FEDERAL DEFENDANTS to deliver water pursuant to order of IID up to 3.85 MAF per year, less the amounts used by the higher priorities. Based on water orders for those higher priorities, IID would be entitled in 2003 to 3,308,600 AF for the benefit of the landowners, including INTERVENORS.

46. The FEDERAL DEFENDANTS do not have any right to redirect any portion of the water rights held in trust by IID to junior rights holders, including MWD, without IID's consent.

47. Pursuant to their December 27, 2002 letter, FEDERAL DEFENDANTS take the unsubstantiated position that IID is entitled to only 2,769,000 AF.

48. If the FEDERAL DEFENDANTS restrict the amount of water delivered to IID, IID will be unable to deliver sufficient irrigation water to its service area, including the lands of INTERVENORS, causing damage to INTERVENORS. INTERVENORS have no other source of water.

49. FEDERAL DEFENDANTS will cause irreparable harm to INTERVENORS.

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50. Due to the unique character of water and the critical importance of this water for the irrigation of crops, money damages would not be a sufficient remedy for the FEDERAL DEFENDANTS' unlawful conduct and INTERVENORS are entitled to an injunction enjoining FEDERAL DEFENDANTS from taking any action to limit the delivery of water to IID to an amount less than 3.85 MAF less the higher priorities.

2nd CLAIM FOR RELIEF

(As to FEDERAL DEFENDANTS – Unlawful taking)

51. Paragraphs 1 through 43 are incorporated herein as if set forth at length.

52. Water rights are property rights protected by the Fifth Amendment of the United States Constitution. Contract rights are afforded the same protection.

53. By their actions, the FEDERAL DEFENDANTS will deprive INTERVENORS of important property rights without just compensation and without fulfilling all procedural requirements to a lawful taking.

54. As a result of the FEDERAL DEFENDANTS' failure to take any of the steps necessary to engage in a lawful taking of property, they should be enjoined from restricting deliveries to IID for the benefit of INTERVENORS and other beneficiaries.

3rd CLAIM FOR RELIEF

(As to FEDERAL DEFENDANTS – Tenth Amendment injunctive relief)

55. Paragraphs 1 through 43 are incorporated herein as if set forth at length.

56. Within California's 4.4 MAF allocation of Colorado River water in a normal flow year, matters of allocation, management, and utilization rest with the State of California and/or California parties under California law.

57. The determination of reasonable and beneficial use of Colorado River water delivered to a California water user is a matter of California law.

58. Intrastate contracts relating to the allocation, priority and/or transfer of California's allocation of Colorado River water are matters of California law.

59. Accordingly, FEDERAL DEFENDANTS' actions to limit water received by IID for the benefit of INTERVENORS and others to less than its intra-state contractual

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priority under the Seven Party Agreement and other agreements, to charge water inconsistently with said contracts, and to otherwise determine how the 4.4 MAF of California water is to be apportioned within California apart from the intra-state agreements are matters beyond FEDERAL DEFENDANTS' authority and are violative of State's rights in violation of the Tenth Amendment.

60. Inasmuch as FEDERAL DEFENDANTS' actions are in violation of the Tenth Amendment, they should be enjoined from limiting IID's water deliveries.

4th CLAIM FOR RELIEF

(As to FEDERAL DEFENDANTS – Contract declaratory relief)

61. Paragraphs 1 through 43 are incorporated herein as if set forth at length.

62. INTERVENORS are informed and believe, and on that basis contend that the FEDERAL DEFENDANTS claim that IID entered into one or more oral or other informal agreements agreeing to restrict IID's take of Colorado River water in 2003.

63. INTERVENORS deny that IID was authorized to enter into any such agreements and that in particular INTERVENORS were never informed that such agreement was being negotiated or contemplated, never ratified any such agreement, nor was any such agreement made public.

64. The FEDERAL DEFENDANTS were before the December 27, 2002 water order aware of the trust termination and the independent rights of the landowners within the IID service area, including INTERVENORS.

65. INTERVENORS further contend that to the extent IID or anyone purporting to act on behalf of IID entered into any such agreements, such agreement is ultra vires under California law and FEDERAL DEFENDANTS knew prior to issuing the December 27, 2002 water order that IID was without authority to agree to any such unilateral modifications to the water rights IID holds in trust for INTERVENORS and others.

66. Accordingly, FEDERAL DEFENDANTS' actions to limit water received by IID for the benefit of INTERVENORS and others to less than its intra-state contractual priority under the Seven Party Agreement and other agreements, to charge water

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inconsistently with said contracts, and to otherwise determine how the 4.4 MAF of California water is to be apportioned within California apart from the intra-state agreements are without justification.

67. INTERVENORS are informed and believe, and on that basis allege that the FEDERAL DEFENDANTS contend that they have acted lawfully whereas INTERVENORS dispute this.

5th CLAIM FOR RELIEF

(As to FEDERAL DEFENDANTS – Tenth Amendment declaratory relief)

68. Paragraphs 1 through 43 are incorporated herein as if set forth at length.

69. Within California's 4.4 MAF allocation of Colorado River water in a normal flow year, matters of allocation, management, and utilization rest with the State of California.

70. The determination of reasonable and beneficial use of Colorado River water delivered to a California water user is a matter of California law.

71. Intrastate contracts relating to the allocation, priority and/or transfer of California's allocation of Colorado River water are matters of California law.

72. Accordingly, FEDERAL DEFENDANTS' actions to limit water received by IID for the benefit of INTERVENORS and others to less than its intra-state contractual priority under the Seven Party Agreement and other agreements, to charge water inconsistently with said contracts, and to otherwise determine how the 4.4 MAF of California water is to be apportioned within California apart from the intra-state agreements are matters beyond FEDERAL DEFENDANTS' authority and are violative of State's rights in violation of the Tenth Amendment.

73. INTERVENORS are informed and believe, and on that basis allege that the FEDERAL DEFENDANTS contend that they have acted lawfully whereas INTERVENORS dispute this.

6th CLAIM FOR RELIEF

(As to MWD – Conspiracy as to dealing in good faith)

74. Paragraphs 1 through 43 are incorporated herein as if set forth at length.

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75. IID, on behalf of its beneficiaries including INTERVENORS, and MWD entered into various agreements setting their mutual rights and priorities to portions of California's allocation of 4.4 MAF, including the Seven Party Agreement and the 1988 Conservation Agreement.

76. All contracts and agreements between IID, on behalf of its beneficiaries including INTERVENORS, and MWD are subject to the implied covenant of good faith and fair dealing found in all California contracts.

77. On December 31, 2002 and before, MWD and/or its agents knowingly and willfully conspired and agreed among themselves and other parties to damage IID's beneficiaries, among whom are INTERVENORS, by depriving them of their contract rights by inducing the FEDERAL DEFENDANTS to breach their agreements to deliver water among MWD and IID pursuant to the contract between MWD and IID.

78. Pursuant to such conspiracy, and in furtherance thereof, MWD did wrongfully reject the December 31, 2002 QSA approved by IID for the express purpose of providing to the FEDERAL DEFENDANTS an alleged justification to reduce IID's water order so that the water subject to such reduction flowed to MWD without MWD's payment therefor.

79. MWD failed to negotiate in good faith over the QSA and other agreements approved by IID on December 31, 2002 for the express purpose of providing to the FEDERAL DEFENDANTS an alleged justification to reduce IID's water order so that the water subject to such reduction flowed to MWD without MWD's payment therefore.

80. Pursuant to such conspiracy, and in furtherance thereof, MWD did wrongfully commit other acts to induce the FEDERAL DEFENDANTS to reduce IID's water order so that the water subject to such reduction flowed to MWD without MWD's payment therefor.

81. On behalf of INTERVENORS and other beneficiaries, IID has performed all conditions and covenants entitling it to receive the full entitlement of its 3.1 MAF water order.

82. As a direct and proximate result of said wrongful act, the trust corpus has been damaged in an amount to be proved at trial.

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83. INTERVENORS are informed and believe, and on that basis allege that MWD contends it has acted lawfully whereas INTERVENORS dispute this.

84. INTERVENORS seek damages to the trust corpus from MWD as allowed by law for its conspiracy to violate the covenant of good faith and fair dealing.

7th CLAIM FOR RELIEF

(As to IID - Failure to manage water prudently)

85. Paragraphs 1 through 43 are incorporated herein as if set forth at length.

86. IID has not cooperated with the landowners and farmers in its service area who are entitled by California law to create a water clearing house operated by such landowners and farmers in order to maximize efficiency.

87. IID is mismanaging the trust assets, including the water rights.

88. By virtue of IID's breach of its duty to act as a reasonably prudent person for the benefit of its beneficiaries, IID has caused IID's water use to be higher than it otherwise would be, all to INTERVENORS' (and others') detriment. INTERVENORS are harmed because they are subject to the FEDERAL DEFENDANTS' water order that ratably reduces the amount of water each may use on their lands based on a water use figure that IID could have improved had it acted reasonably towards its beneficiaries, including INTERVENORS.

89. INTERVENORS are informed and believe, and on that basis allege that IID contends it has acted lawfully and owes its beneficiaries no other duties whereas INTERVENORS dispute this.

8th CLAIM FOR RELIEF

(As to IID - No authority to modify trust)

90. Paragraphs 1 through 43 are incorporated herein as if set forth at length

91. IID entered into an agreement with SDCWA that purports to make water available to SDCWA, once said agreement becomes final.

92. IID has no authority to unilaterally change the terms of trust under which it holds the water rights for INTERVENORS', and others', benefit. Probate Code §§ 15401 and 15404.

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93. IID breached its duty to INTERVENORS and other landowner beneficiaries by acting in the interest of others rather than its beneficiaries. Probate Code § 16002.

94. INTERVENORS are harmed because they are subject to the FEDERAL DEFENDANTS' water order that ratably reduces the amount of water each may use on their lands based in part on IID's modification of its trust through the SDCWA agreement taken without beneficiary consent.

95. INTERVENORS are informed and believe, and on that basis allege that IID contends it has acted lawfully and owes its beneficiaries no other duties whereas INTERVENORS dispute this.

9th CLAIM FOR RELIEF

(As to IID - Failure to inform beneficiaries)

96. Paragraphs 1 through 43 are incorporated herein as if set forth at length.

97. IID entered into an agreement with SDCWA that purports to make water available to SDCWA, once said agreement becomes final.

98. As trustee, IID owes its beneficiaries candor and full disclosure.

99. IID provided no meaningful notice to beneficiaries so that beneficiaries could exercise their rights, even though IID has the names and addresses of all of its beneficiaries at its disposal. Probate Code § 16060.

100. INTERVENORS are harmed because they are subject to the FEDERAL DEFENDANTS' water order that ratably reduces the amount of water each may use on their lands based on the SDCWA agreement of which beneficiaries were not provided with meaningful notice such that beneficiaries could have exercised their rights.

101. INTERVENORS are informed and believe, and on that basis allege that IID contends it has acted lawfully and owes its beneficiaries no other duties whereas INTERVENORS dispute this.

10th CLAIM FOR RELIEF

(As to IID - Deprivation of property)

102. Paragraphs 1 through 43 are incorporated herein as if set forth at length.

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103. IID entered into an agreement with SDCWA that purports to make water available to SDCWA, once said agreement becomes final.

104. Water rights are as a matter of California law property rights, including equitable water rights.

105. By its actions and omissions IID has deprived INTERVENORS of a portion of their property rights without compensation.

106. Even if no water is ever transferred to SDCWA, INTERVENORS and others will have been deprived of a portion of their property rights in that the SDCWA agreement will purport to act as a lien on their lands restricting their ability to use their lands.

107. INTERVENORS are informed and believe, and on that basis allege that IID contends it has acted lawfully and owes its beneficiaries no other duties whereas INTERVENORS dispute this.

11th CLAIM FOR RELIEF

(As to IID - IID not impartial among its beneficiaries)

108. Paragraphs 1 through 43 are incorporated herein as if set forth at length.

109. IID entered into an agreement with SDCWA that purports to make water available to SDCWA, once said agreement becomes final.

110. The terms of the purported agreement do not reflect that beneficiaries of trust are to receive all value of the transfer of trust assets on a ratable basis, whereas certain terms contemplate that non-beneficiaries will receive certain value of the water exchange.

111. IID has breached its duty to administer the trust impartially among beneficiaries by failing to provide in its purported agreement with SDCWA that (1) all value received in exchange for the water rights IID holds in trust will inure to the beneficiaries and (2) that such distribution of value will be done ratably per acre. Probate Code § 16003.

112. INTERVENORS are informed and believe, and on that basis allege that IID contends it has acted lawfully and owes its beneficiaries no other duties whereas INTERVENORS dispute this.

12th CLAIM FOR RELIEF

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(As to IID - IID lacks authority to bind INTERVENORS' water rights)

113. Paragraphs 1 through 43 are incorporated herein as if set forth at length.

114. INTERVENORS' (and other landowners') revocation of IID's authority over their water rights is unequivocal.

115. IID continues to act as if revocation was meaningless and is harming INTERVENORS' rights by not informing third parties (including FEDERAL DEFENDANTS) that its authority has been limited.

116. INTERVENORS are harmed because they are subject to the water order that ratably reduces the amount of water each may use on their lands despite revoking the authority of IID to bind their lands.

117. INTERVENORS are informed and believe, and on that basis allege that IID contends it has acted lawfully and owes its beneficiaries no other duties whereas INTERVENORS dispute this.

WHEREFORE:

1. As to the 1st CLAIM, issue an injunction preventing the FEDERAL DEFENDANTS from taking any action to limit ID's 2003 Colorado River allocation to an amount less than 3.85 MAF less the higher priorities.

2. As to the 2nd CLAIM, issue an injunction preventing the FEDERAL DEFENDANTS from taking any action to limit ID's 2003 Colorado River allocation to an amount less than 3.85 MAF less the higher priorities.

3. As to the 3rd CLAIM, issue an injunction preventing the FEDERAL DEFENDANTS from taking any action to limit ID's 2003 Colorado River allocation to an amount less than 3.85 MAF less the higher priorities.

4. As to the 4th CLAIM, a declaration that FEDERAL DEFENDANTS have violated the water rights of the beneficiaries of IID, including INTERVENORS.

5. As to the 5th CLAIM, a declaration that FEDERAL DEFENDANTS have violated the Tenth Amendment.

6. As to the 6th CLAIM, damages according to proof for MWD's conspiracy to

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violate the covenant of good faith and fair dealing.

7. As to the 7th CLAIM, a declaration that that IID has breached its fiduciary duty to INTERVENORS.

8. As to the 8th CLAIM, a declaration that that IID has breached its fiduciary duty to INTERVENORS.

9. As to the 9th CLAIM, a declaration that that IID has breached its fiduciary duty to INTERVENORS by failing to inform the beneficiaries of the proposed changes to the trust and that in order to effect any such change IID must provide sufficient notice thereof to its beneficiaries so that they may exercise their rights.

10. As to the 10th CLAIM, a declaration that IID has breached its fiduciary duty to INTERVENORS and that landowners are entitled to all proceeds of any transfer of trust assets.

11. As to the 11th CLAIM, a declaration that that IID has breached its fiduciary duty to INTERVENORS.

12. As to the 12th CLAIM, a declaration that IID no longer has the authority to administer the water rights of INTERVENORS.

13. Costs and attorney fees as allowed by law.

14. Trial by jury as to all matters so triable, and

15. Other relief be granted as the Court considers just and proper.

Date: _____, 2003

_____
Patrick J. Maloney
Attorney for INTERVENORS

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